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PROCEEDINGS AND ORDERS DATE: 053185

CASE NBR 84-1-00634 CFX
SHORT TITLE Chevron U.S.A., Inc., et al. DOCKETED: Oct 19 1984
VERSUS Sheffield, Gov. of AK, et al

Date	Proceedings and Orders
Oct 19 1984	Petition for writ of certiorari filed.
Nov 23 1984	Brief of respondents Jay S. Hammond, Governor, et al. in opposition filed.
Dec 5 1984	DISTRIBUTED. January 4, 1985
Jan 7 1985	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice O'Connor OUT.
Apr 22 1985	Brief amicus curiae of United States filed.
Apr 24 1985	REDISTRIBUTED. May 9, 1985
May 1 1985	Reply brief of petitioners Chevron U.S.A., Inc., et al. filed.
May 10 1985	REDISTRIBUTED. May 16, 1985
May 17 1985	REDISTRIBUTED. May 23, 1985
May 24 1985	REDISTRIBUTED. May 30, 1985

84-634

No. 84-____

IN THE

Supreme Court of the United States

October Term, 1984

CHEVRON U.S.A., INC., *et al.*,

Petitioners,

vs.

JAY S. HAMMOND, GOVERNOR OF THE STATE OF ALASKA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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103 pp

QUESTION PRESENTED

May the State of Alaska, consistent with the Supremacy Clause, prohibit oil tankers from discharging clean ballast into waters of the State in the face of the Coast Guard's consideration and rejection of such a prohibition and its adoption, pursuant to federal statutes, of regulations expressly permitting the discharge of clean ballast within the territorial seas, including Alaska's waters?*

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*Although a number of additional parties participated in various phases of the proceedings below, petitioners here are Chevron U.S.A., Inc., a subsidiary of Standard Oil Company of California; Atlantic Richfield Company; Exxon Corporation; Mobil Oil Corporation; and the American Institute of Merchant Shipping by the following participating members: AMOCO Transport Company, a subsidiary of Standard Oil Co. (Indiana); Crowley Maritime Corporation; OSG Bulk Ships, Inc., a subsidiary of Overseas Shipholding Group, Inc.; and Texaco Inc. Pursuant to Supreme Court Rule 28.1, these parties-in-interest are affiliated with the following publicly-traded corporations: Chevron: Cetus Corp., Caltex Australia, Ltd., AMAX Inc., and Huntington Beach Company; Atlantic Richfield: Sinclair & Venezuela Oil Co., Park Premier Mining Company, and Utal Corp.; Exxon: Exxon Pipeline Co., Exxon Shipping Co., Imperial Oil Ltd. (Canadian), and Reliance Electric Co.; Mobil: Superior Oil Company, Mobil Alaska Pipeline Company, Montgomery Ward Company, Inc., Montgomery Ward Credit Corp., MARCOR, Inc., and Container Corporation of America; Standard Oil (Indiana): AMOCO Canada Petroleum Company, Ltd., AMOCO Credit Corp., AMOCO Oil Holdings S.A., Analog Devices Inc., Cetus Corp., Cyprus Mines Corp., AMOCO (U.K.) Exploration Company, and AMOCO Australia Ltd.; Crowley: None; Overseas Shipholding: None; Texaco: Texaco Canada, Ltd., Texaco, Mexicana, S.A., Wyco Pipeline Co., Scandinaviska Raffinaderi Aktiebolaget Scanraff, Deutch Texaco Aktiengesellschaft, Texaco Marco, Refineria Texaco de Honduras, S.A., Societa Per Azioni Raffineria, West Shore Pipeline Co., Locap Inc., Dixie Pipeline Co., and Ful-Tex Euro Services, Inc.

Appellants below were Jay S. Hammond, Governor of the State of Alaska, Lowell Thomas, Jr., Lieutenant Governor of the State of Alaska, Avrum M. Gross, Attorney General of the State of Alaska, Ernest W. Mueller, Commissioner of Alaska Department of Environmental Conservation, the Cordova District Fisheries Union, Trustees for Alaska, and Frank A. Tupper. Appellees below, other than petitioners, were Gulf Oil Corporation, International Ocean Transport Corporation, Union Oil Company of California, Intercontinental Bulktank Corp., Overseas Bulktank Corp., Ocean Tankships Corp., First Shipmor Associates, Second Shipmor Associates, Third Shipmor Associates, Fourth Shipmor Associates, Manhattan Tankers Co., Inc., Queensway Tankers, Inc., Alaska Bulk Carriers, Inc., Mathieson's Tanker Industries, Inc., Acquilla Shipping Co., Inc., and Maritime Overseas Corp. The United States of America appeared and filed a brief amicus curiae.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes And Rules

Federal Register Materials

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Chevron U.S.A., Inc., *et al.* petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, at 1a-37a) is reported at 726 F.2d 483. The court of appeals' order denying a petition for rehearing (App. D, *infra*, at 67a-68a) is unreported. The opinion and the final judgment of the district court (App. B, *infra*, at 38a-60a, and App. C, *infra*, at 61a-66a) are also unreported.

JURISDICTION

The opinion of the court of appeals was rendered on February 3, 1984. Thereafter, petitioners moved that court, pursuant to Federal Rules of Appellate Procedure 26(b) and 40(a), for an order enlarging time within which to seek a rehearing, and submitted a petition setting forth the grounds for rehearing. Prior to this Court's June 18, 1984 denial of petitioners' request for leave to file an untimely petition for certiorari, the court of appeals granted the enlargement motion. By order dated June 13, 1984, it recalled its mandate and granted petitioners leave to file, and ordered filed, their petition for rehearing. In a two-page opinion issued on August 9, 1984, the court denied rehearing. Jurisdiction over this petition is invoked under 28 U.S.C. § 1254(1) (1976). The petition is timely pursuant to Supreme Court Rule 20.4.[1]

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[1]A petition for writ of certiorari is timely if filed within 90 days of the denial of a timely petition for rehearing filed by any party. *See* 28 U.S.C. § 2101(c) (1976); Sup. Ct. R. 20.4. A petition for rehearing to the court of appeals is timely if filed within 14 days of entry of judgment or within such other period as is prescribed by the court. *See* Fed. R. App. P. 40(a). Because the court below extended petitioners' time for petitioning for rehearing, and because it accepted their petition as timely filed, the time for petitioning this Court for a writ of certiorari did not begin to run until the August 9, 1984 denial of rehearing by the court of appeals. *See, e.g., Bowman v. Loperena*, 311 U.S. 262, 266 (1940) ("where the court allows the filing [of a petition for rehearing beyond the time limit ordinarily prescribed] and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time to appeal runs from the date thereof").

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions — the Supremacy Clause (Article VI, Clause 2) of the United States Constitution and Section 46.03.750, Alaska Statutes — are set out in Appendix E, *infra*, at 69a.

STATEMENT OF THE CASE

By virtue of Alaska law, a federally certificated tanker, inspected and licensed by the Coast Guard for the carriage of oil, is effectively prohibited from operating in the Alaska coastwise trade for which it was specifically designed and constructed. Built in conformance with Coast Guard regulations to carry and discharge ballast from its cargo tanks, the vessel's operations are imperiled by an Alaska statute, upheld by the court below, which absolutely prohibits the discharge of ballast from cargo tanks within waters of the State. This prohibition was adopted by the State despite a long-standing Coast Guard regulation authorizing oil tankers to discharge such ballast and that agency's consideration and rejection of the same prohibition. Because the Alaska law, particularly to the extent that it presages similar legislation by other coastal states, threatens to disrupt the tanker industry and to undermine ongoing Coast Guard and international regulatory programs, review by this Court is warranted.

1. Federal and State Statutes and Regulations At Issue. Essential to the safe operation of tank vessels is an operation known as "ballasting." After a tanker has unloaded its cargo, and prior to the commencement of its unladen (or ballast) voyage, a tanker must take on sea water in order properly to submerge its propeller and rudder, to minimize stress on the tanker's hull and bulkheads, and to ensure vessel stability. Principally in older and smaller vessels, this sea water — known as "ballast" or "ballast water" — is loaded into empty cargo compartments.[2] Immediately prior to or upon arrival

[2]Newly constructed crude oil carriers in excess of 20,000 deadweight tons ("DWT") and newly constructed product carriers in excess of 30,000 DWT are required by federal regulations and international conventions to be equipped with "segregated ballast" tanks ("SBT") — compartments used exclusively for the carriage of ballast water and not connected to the vessel's cargo oil and fuel systems. Existing product carriers in excess of 20,000 DWT must at various times beginning on January 2, 1986 be retrofitted with SBT or "dedicated clean ballast" tanks ("CBT") — former cargo tanks dedicated for the carriage of ballast water but which remain connected to the vessel's piping and pumping systems. Existing crude oil carriers in excess of 20,000 DWT that are not equipped with crude oil washing systems ("COW") must at various times beginning on January 2, 1986 be retrofitted with SBT. Existing crude and product carriers of less than 20,000 DWT and existing crude carriers of between 20,000 and 70,000 DWT equipped with COW are exempt from the SBT and CBT requirements. *See* 46 U.S.C.A. §§ 3705-06 (West Supp. 1983); 33 C.F.R. § 157.09, .10a & .10b (1983); U.S. Coast Guard, Proposed Rules Respecting Segregated Ballast, Dedicated Clean Ballast and Crude Oil Washing, 49 Fed. Reg. 2998 (1984) (*to be codified at* 33 C.F.R. § 157.10c).

at a loading port, the ballast is discharged and replaced by cargo. Having been stored in a compartment previously used for the carriage of oil, the ballast water will necessarily have some oil content which is discharged during deballasting.

Fulfilling its mandate under the Ports and Waterways Safety Act of 1972, Pub. L. 92-340, 86 Stat. 424 (1972) (the "PWSA") to minimize "damage to the marine environment by normal vessel operations such as ballasting and deballasting," PWSA § 201(7)(A), in 1975 the Coast Guard promulgated regulations governing the discharge of ballast water from cargo tanks. *See* U.S. Coast Guard, Rules and Regulations for Protection of the Marine Environment Relating to Tank Vessels Carrying Oil In Domestic Trade, 40 Fed. Reg. 48280 (1975) (hereafter "1975 Domestic Trade Rules") (codified as amended at 33 C.F.R. § 157.01 *et seq.* (1983)). While prohibiting the discharge of "dirty ballast" within 50 miles of land, the Coast Guard regulations expressly authorize the master of a vessel to discharge "clean ballast" within 50 miles of land and while in port (33 C.F.R. § 157.43 (1983)).[3] This

[3]The Coast Guard defines ballast water carried in cargo compartments as an "oily mixture." Such ballast water is of two types: "clean ballast" is defined as "ballast in a cargo tank which, if discharged from a vessel that is stationary into clean, calm water on a clear day, would

regulation was adopted only after thorough consideration and rejection of the alternatives, including a "zero discharge standard" — the absolute prohibition of the discharge of any oily ballast. Although since 1975 the Coast Guard has extended its rules to foreign vessels operating in U.S. waters and to U.S. vessels engaged in foreign trade and although more recently it has promulgated more stringent controls for the purpose of further reducing ballast-related pollution, the express authorization to discharge clean ballast has remained unchanged. *See* U.S. Coast Guard, Final Rules Respecting Tank Vessels Carrying Oil in Bulk, 48 Fed. Reg. 45718 (1983).

Disagreeing with the judgment of the Coast Guard as to how far the regulation of deballasting should go, in 1976 the State of Alaska adopted the Tanker Act, 1976 Alaska Laws, ch. 266, and thereby imposed its own comprehensive scheme for the regulation of the design, construction and operation of tankers plying the Alaska trade. As part of this scheme, in AS 46.03.750(e) the Tanker Act imposed an absolute prohibition on the discharge of ballast from cargo tanks and required that all such ballast "be processed by or in an onshore ballast water treatment facility." In 1980 this "zero discharge standard" was moved to AS 46.03.750(a), and amended to provide:

> "Except as provided in (b) of this section, a person may not cause or permit the discharge of ballast water from a cargo tank of a tank vessel into the waters of the state. A tank vessel may not take on petroleum or a petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast from cargo tanks into the waters of the state and the master of the vessel certifies that fact on forms provided by the department."[4]

not: (1) Produce visible traces of oil on the surface of the water or on adjoining shore lines; or (2) Cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shore lines." 33 C.F.R. § 157.03(e) & (p) (1983). Generally, ballast which complies with the "visible sheen test" will have an oil content of approximately 15 parts per million or less. *See* U.S. Coast Guard, Rules Respecting Engineering Equipment, 44 Fed. Reg. 53352, 53355 (1979). All other ballast water carried in cargo tanks is classified as "dirty ballast."

2. Factual Background. Enforcement of Alaska's deballasting prohibition threatens to alter radically the nature of tanker operations in Alaska's coastwide trade, a trade in which petitioner Chevron U.S.A., Inc. ("Chevron") is heavily engaged. From refineries located at Nikiski, on Alaska's Kenai Peninsula, as well as Richmond and El Segundo, California, Chevron moves refined petroleum products to primary bulk storage facilities at Valdez, Ketchikan and Dutch Harbor. From these locations, refined products are delivered by tank vessel to several secondary storage facilities abutting some of Alaska's smaller ports, including Cold Bay, Kodiak, Steward, Skagway, Yukatat, Homer, Cordova and Juneau. Products are also delivered by tanker from Chevron's primary bulk storage locations and its Nikiski refinery to numerous fish processing plants, lumber companies and other Chevron customers along the Alaska coast. Like those customers who receive petroleum products from secondary storage facilities, these industrial and individual consumers are entirely dependent on Chevron's tanker deliveries for their petroleum needs.

Chevron's coastwise trade relies almost exclusively on the Alaska Standard, a 2,648 DWT tanker built in 1959 which, because of the shallow draft of the ports it must serve, was specifically designed to deliver refined products along the Alaska coast. As is the case with most other tankers, the Alaska Standard is not equipped with a sufficient number of segregated ballast compartments to meet its ballast needs. Accordingly, as it discharges cargo at receiving ports, it must load additional ballast into empty cargo tanks. Prior to taking on a new cargo at one of Chevron's primary bulk

[4] AS 46.03.750(b) exempts from this prohibition the discharge of ballast when "necessary for the safety of the tank vessel and [when] no alternative action is feasible." By stipulation of the parties, enforcement of the Alaska statute has been stayed pending final resolution of this litigation.

storage locations, this ballast is discharged overboard. Deballasting is done pursuant to Coast Guard regulations that require that the effluent be discharged and monitored so as not to cause a visible sheen on the water.

Because the Alaska Standard cannot feasibly be equipped with sufficient segregated ballast capacity to obviate the need for ballasting its cargo tanks,[5] enforcement of the Alaska deballasting prohibition effectively requires that the vessel discharge ballast into onshore treatment facilities. However, none of the primary storage facilities at which the Alaska Standard loads cargo has a treatment plant that can accommodate the vessel.[6] Further, the economics of servicing coastal Alaska cannot justify the cost of constructing new facilities for the Alaska Standard, a cost which in 1978 Chevron estimated to be in excess of $1.5 million. Short of withdrawing from a trade on which the lives and livelihoods of so many coastal Alaskans depend, the practical effect of Alaska's prohibition is to require Chevron to retire the Alaska Standard and replace it with tug and barge oil transport — an alternative Chevron has thus far resisted because of the greater safety inherent in tanker transportation.

The dilemma facing the Alaska Standard will not be unique if the other coastal states are free to follow Alaska's lead and impose their own deballasting prohibitions. Like the Alaska

[5]The Alaska Standard's carrying capacity is only 18,000 barrels. Safely to navigate Alaska's waters, which can be treacherous during the winter months, the vessel requires up to 8,500 barrels of ballast. As documented in the district court record, if sufficient cargo tanks were converted and dedicated to the carriage of ballast, the vessel's cargo carrying capacity would be so reduced that its continued operation in the Alaska trade would cease being practical or economically viable.

[6]The treatment facility operated at Valdez by the Valdez Dock Company has a total capacity of 5,000 barrels and a processing rate of 42 barrels per hour, far too limited to accommodate the Alaska Standard's 8,500 barrels of ballast water. (The Valdez facility operated by Alyeska Pipeline Services cannot accept at its dock vessels smaller than 16,000 DWT.) Ketchikan has facilities for receiving but not treating 1,100 barrels, which must be transported elsewhere by tanker or barge for processing. Dutch Harbor has neither receiving nor treatment facilities.

Standard, a sizeable percentage of vessels comprising the U.S. Flag Fleet is neither equipped, nor required to be retrofitted, with segregated or dedicated clean ballast capacity. According to the Coast Guard's current census, some fifteen U.S. Flag tank vessels are totally exempt from segregated and dedicated clean ballast requirements because they are under 20,000 DWT. Further, of the 100 currently active tankers in the 20,000 to 40,000 DWT class, only two have a sufficient number of segregated ballast compartments to be considered fully segregated ballast vessels. And of the 92 active vessels in excess of 40,000 DWT, 41 are exempt from segregated ballast requirements primarily because they are equipped with crude oil washing systems.

Further, there currently exists in the United States very little shoreside reception capacity capable of receiving clean ballast. Indeed, a recent Department of Transportation study concerning available facilities for the reception of dirty ballast and other highly contaminated shipboard wastes — facilities which are far more plentiful than those that can additionally accept clean ballast — revealed that fifteen of the nation's seventy-three petroleum loading ports lacked any such capacity.[7] Facilities at the remaining ports would quickly become overtaxed were they required to receive clean ballast in addition to more concentrated oily wastes. For as the Coast Guard has noted, "[v]ery few ports have adequate facilities for receiving and processing large volumes of mixtures containing little oil." 42 Fed. Reg. 32670, 32671 (1977).

3. Proceedings Below. Proceedings were commenced in the district court when, on the eve of the Tanker Act's effective date in September 1977, Chevron, joined by a number of other owners of fleets of tank vessels and the American Institute of Merchant Shipping, filed a complaint challenging the constitutionality of various of the Act's provisions and the regulations

[7]*See* Research and Special Programs Admin., U.S. Dep't of Transportation, *Draft Evaluation of Proposed U.S. Coast Guard Regulations Implementing Regulation 12 of the Protocol of 1978*, Tables 4.13 & 5.1 (Sept. 1983).

promulgated thereunder. Following disposition of a number of unrelated issues,[8] on December 29, 1978, petitioners moved for summary judgment declaring unconstitutional Alaska's ban on deballasting. On September 18, 1979, the district court handed down its decision. After thoroughly reviewing the PWSA and its successor, the Ports and Tanker Safety Act, Pub. L. 95-474, 92 Stat. 1471 (1978) (the "PTSA"), and their legislative histories, and after assessing the potential impact of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1976), the district court concluded:

> "Federal jurisdiction over ballasting and deballasting of tankers is, by reason of Title II, PWSA, exclusive and State statutes and regulations relating to this subject are preempted" (App. B, *infra*, at 58a).

Further, the district court held that, to the extent Congress did "not completely foreclose state legislation" affecting deballasting, Alaska's law was "in conflict with Coast Guard regulations" and therefore invalid (*id.* at 59a). Respondents appealed.

In February 1984, a panel of the court of appeals reversed the district court and directed that judgment be entered in favor of the state officials on the preemption issue. The court began its analysis by concluding that Congress did not intend by the PWSA/PTSA to occupy the field of deballasting regulation. Although recognizing that in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court held that Title II of the PWSA was intended to preempt state regulation, the court confined the holding of *Ray* to vessel design and con-

[8] In the aftermath of this Court's March 1978 decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the defendant state officials abandoned their defense of various of the Act's equipment, operating and tug escort requirements. Thereafter, following a trial, in June 1978 the district court invalidated provisions of the Tanker Act establishing a Coastal Protection Fund financed by a system of annual "risk charge" assessments levied on tankers operating in Alaska's waters on the basis of their design characteristics; and in September 1981 the district court struck down as violative of the Fourth Amendment Alaska's scheme of warrantless tanker inspections. The defendant state officials did not appeal these rulings.

struction standards (App. A, *infra*, at 6a). It distinguished federal deballasting rules promulgated pursuant to Title II, noting that although ship design and construction are matters for national attention, the control of marine pollution "should be a collaborative federal/state effort rather than an exclusively federal one" (*id.* at 10a). In this regard, the court looked not to the provisions of the PWSA/PTSA, which it recognized entrusted the regulation of tanker deballasting to the Coast Guard, but rather to the Clean Water Act. From that Act, which the court characterized as the "heart" of the federal marine environmental protection scheme, the court discerned a congressional intent to maintain the primacy of the states in dealing with pollution, including ballast-related pollution, within their coastal waters. The court of appeals concluded that "[s]uch joint regulation [under the Clean Water Act] undermines the argument that Congress in enacting the PWSA/PTSA implicitly intended to occupy the field of regulating tanker pollution in a state's territorial waters" (*id.* at 12a).

The court also dismissed the argument that state regulation of deballasting would frustrate the objectives that Congress sought to achieve when it entrusted this aspect of vessel regulation to the Coast Guard. Although it recognized that Congress intended for the Coast Guard to formulate a set of complementary design and operational rules to minimize ballast-related pollution, balanced against the economic impact of such regulation, the court perceived no threat to this objective by disparate state standards. In the court's view, because of the absence of any need for "uniformity in the area of coastal environmental regulation," the weighing and balancing required of the Coast Guard "could co-exist with the opportunity for the states to set stricter standards" (*id.* at 17a).

The court of appeals similarly rejected the claim that piecemeal deballasting regulation by the states would stand as an obstacle to the congressional objective of achieving international agreement respecting tanker controls. Relying on its narrow construction of *Ray*, the court concluded that

"although national uniformity and international consensus are critical concerns in the establishment of tanker design standards, those concerns are not essential in the regulation of pollutant discharges into coastal waters" (*id.* at 18a).

Finally, the court found no actual conflict between Coast Guard regulation expressly permitting the controlled discharge of clean ballast within 50 miles of land and the Alaska law prohibiting it. Ignoring the Coast Guard's rejection of the State's preferred solution, and the amicus brief of the United States on behalf of the Coast Guard challenging the Alaska law as in conflict with federal regulations, the court of appeals observed that compliance with both is not a physical impossibility. Further, the court found that the objective of the State regulation — the absolute prohibition of ballast inputs into the coastal waters — complemented the federal policies implicit in the PWSA/PTSA and the Clean Water Act — the eventual elimination of harmful ocean pollution (*id.* at 28a).

On rehearing, petitioners sought to correct two significant misconceptions on which the court of appeals' decision appeared to be based. Petitioners noted, first, that Alaska's deballasting prohibition had not been promulgated under the authority of the Clean Water Act; and second, that as construed by the EPA, and as codified in its regulations, the Clean Water Act was not intended to apply to discharges resulting from vessel operations such as deballasting. The court of appeals dismissed the first observation as irrelevant — noting that its reliance on the Act was simply to demonstrate a "congressional intent ... that there should be federal-state collaboration in the regulation of oil pollution within three miles of shore" (App. D, *infra*, at 67a). The court of appeals rejected petitioners' reliance on the EPA's interpretative regulation with the comment that it did not rise to the level of a "specific administrative interpretation relating to deballasting" (*id.* at 68a).

REASONS FOR GRANTING THE PETITION

In *Ray v. Atlantic Richfield Co., supra,* this Court recognized Congress' intent to establish a single, federal regime for the regulation of the oil tanker trade. The Court held that, as to matters requiring uniformity such as tanker design and construction standards, the power of that regime was intended to be absolute. But even as to matters which do not require across-the-board uniformity, such as vessel size limitations and tug escort requirements, the Court held that once the Coast Guard has addressed the issue, conflicting or more rigorous state regulation must give way (*see* 435 U.S. at 171-73, 175-78).

In the case at bar, the Coast Guard, after several years of careful consideration, determined that the controlled discharge of clean ballast from cargo tanks should be permitted, and it expressly rejected the zero-discharge standard that the State of Alaska prefers. These decisions grew out of a congressionally mandated assessment of the ballast-related pollution problem, including consideration and adoption of complementary design and equipment solutions, the economic costs of more stringent regulations and the environmental benefits to be gained thereby. These decisions also reflected the Coast Guard's mandate to discharge its regulatory authority with sensitivity toward international implications of standards it adopted and mindful of the Congress' desire to promote multinational agreement. Alaska's deballasting prohibition thus stands not only in conflict with Coast Guard regulations but also as an obstacle to the accomplishment of important congressional objectives underlying those regulations.

I.

ALASKA'S DEBALLASTING PROHIBITION CONFLICTS WITH FEDERAL REGULATIONS EXPRESSLY PERMITTING THE CONTROLLED DISCHARGE OF CLEAN BALLAST

In 1972, Congress enacted the PWSA, Pub. L. 92-340, 86 Stat. 424 (1972), in significant part to establish a comprehen-

sive federal regulatory approach for the protection of the marine environment from the hazards of oil tanker operations. To this end, Title II of the Act directed the Coast Guard to adopt "rules and regulations as may be necessary . . . with respect to the operation of such vessels" in order to "prevent or mitigate the hazards to life, property, and the marine environment." PWSA § 201(1) & (3), 46 U.S.C. § 391a(1) & (3) (1976). Specifically, the Coast Guard was charged with the responsibility of promulgating standards "to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting." *Id.* § 201(7)(A), 46 U.S.C. § 391a(7)(A) (1976).[9]

After nearly two years of study following the enactment of the PWSA, in October 1975 the Coast Guard promulgated a comprehensive, economically sensible and technically feasible set of complementary design, equipment and operating standards adopted for the purpose of achieving "a significant reduction of operational pollution from tank cleaning and deballasting operations." 1975 Domestic Trade Rules, at 48280.[10] Although imposing design and equipment requirements on newer, larger vessels to eliminate the need to place ballast in cargo tanks in the first instance, the Coast Guard recognized that such solutions were not practical or appropriate in the case of vessels of the size and vintage of the Alaska Standard and, instead, opted in favor of an operational solution. As to these tankers, the Coast Guard limited the dis-

[9]Congress reiterated these directions in 1978, when it enacted the PTSA, Pub. L. 95-474, 92 Stat. 1471 (1978), now codified at 46 U.S.C.A. §§ 3701-18 (West Supp. 1983). By that Act, the Coast Guard was directed to promulgate regulations for the "enhanced protection of the marine environment," including regulations designed to achieve "the reduction or elimination of discharges during ballasting [and] deballasting." PTSA § 5(6)(A)(vii), 46 U.S.C.A. § 3703(a)(7) (West Supp. 1983).

[10]The Coast Guard rulemaking proceedings respecting deballasting controls, which began in January 1973 when the agency published an advance notice of proposed rulemaking (*see* 38 Fed. Reg. 2467 (1973)), were suspended pending the outcome of the 1973 International Conference on Marine Pollution (*see* 38 Fed. Reg. 17848 (1973)). Coast Guard deliberation was resumed in late 1973, and on

charge of dirty ballast to operations on the high seas, but expressly authorized the discharge of clean ballast while in or enroute to port subject only to the requirements that the vessel be equipped with an operative automatic oil discharge monitoring and control system meeting Coast Guard specifications and that it discharge through a fixed piping system above the waterline. *See* 33 C.F.R. § 157.43(a) (1983).[11]

In rulemaking following the enactment of the PTSA, the Coast Guard significantly lowered the deadweight tonnage thresholds for segregated ballast and sanctioned other design and equipment solutions to the ballast pollution problem. Thus, in regulations proposed in February 1979 and adopted in November 1979, the Coast Guard imposed segregated or dedicated clean ballast requirements on various new and existing vessels as small as 20,000 DWT. However, for still smaller tankers, as well as crude oil carriers of various sizes equipped with crude oil washing systems,[12] the Coast Guard took no steps to prohibit the carriage of ballast in cargo compartments and retained the regulation expressly authorizing the dis-

June 28, 1974 the agency issued its proposed regulations (*see* 39 Fed. Reg. 24150 (1974)) and a comprehensive Draft Environmental Impact Statement. Thereafter, public comments were solicited and evaluated and hearings held during July 1974. Following this evaluation and the completion of various studies, on August 15, 1975 the Coast Guard released its final environmental impact statement (*see* U.S. Coast Guard, *Final Environmental Impact Statement, Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade — Protection of the Marine Environment* (August 15, 1975) (hereafter *"1975 Coast Guard EIS"*)). And on October 14, 1975 it adopted and published its rules and regulations for tank vessels carrying oil in the domestic trade.

[11]In 1976, these regulations were made applicable to U.S. Flag tank vessels in foreign trade and foreign flag tank vessels operating in the navigable waters of the United States (*see* 41 Fed. Reg. 54179 (1976)).

[12]Crude oil washing is a cargo tank cleaning system that employs crude oil rather than sea water as the tank washing medium. Because of the solvent properties of oil, COW is more effective in removing oil residues from a cargo tank than are water washing systems. Accordingly, the use of COW followed by a water rinse of the tanks generally enables the vessel to achieve a clean ballast condition when the tanks are ultimately ballasted. *See* U.S. Coast Guard, *Final Regulatory Analysis and Environmental Impact Statement, Regulations to Implement the Results of the International Conference on Tanker Safety and Pollution Prevention* 32 (1979) (hereafter *"1979 Coast Guard EIS"*).

charge of clean ballast in state waters. *See* U.S. Coast Guard, Proposed Rules Respecting Tank Vessels of 20,000 DWT or More Carrying Oil In Bulk, 44 Fed. Reg. 8984 (1979); U.S. Coast Guard, Interim Final Rules, etc., 44 Fed. Reg. 66502 (1979) (hereafter "1979 Coast Guard Rules").

The court below found no conflict between the Coast Guard's authorization to discharge clean ballast and Alaska's across-the-board deballasting prohibition principally because "the state law prohibits acts that the federal regulations allow but do not require." (App. A, *infra*, at 30a). Thus, the court observed, "No party contends that it is physically impossible to comply with both the Alaska statute and the relevant Coast Guard regulations" (*id.* at 33a).

This Court has repeatedly held, however, that an irreconcilable conflict may arise between federal law and a more rigorous state standard even when the federal regulation is permissive. As the Court noted in *Ray*,

> "'[W]here failure of ... federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted to use their police power to enact such a regulation."

435 U.S. at 178, *quoting Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947); *see Fidelity Federal Savings and Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 146 (1982) (holding that California's prohibition on the enforcement of "due-on-sale" clauses by federal savings and loan associations was preempted by a Federal Home Loan Bank Board regulation providing that such an "association continues to have the power" to enforce such clauses). That is precisely the case here.

During its initial consideration of deballasting controls in the early 1970's, the Coast Guard was urged to adopt a total prohibition on the discharge of ballast water from cargo tanks, *i.e.*, a "zero-discharge" standard. For reasons explained

in the *1975 Coast Guard EIS* (*see* note 10, *supra*), the Coast Guard rejected this proposal:

> "In order to reduce operational outflows, regulations prohibiting any discharge of any oily mixture to the sea from a tank vessel's cargo spaces might be published....
>
> "The concept of a total prohibition against discharges of oily mixtures into the sea and these means of achieving such a goal have been rejected for the following reasons: it is inconsistent with the standards established by the 1973 Marine Pollution Convention; it would create greater shore reception facility problems than we already have with the proposed regulations; it would involve additional time delays for tankers; and it sets a standard that will be impractical for application to vessels other than tankers" (*id.* at 60a-60b).

Further, the Coast Guard was urged to adopt more stringent standards for vessels operating in the coastal trade. As one commentator argued, "[T]here is an environmental justification for applying higher standards to coastal traffic. Coastal tankers will tend to spend more time in ecologically sensitive waters. Thus, ballasting operations may seriously damage the environment, even if low effluent levels can be achieved" (*id.* at 133). The Coast Guard found this proposal unpersuasive and, from an environmental standpoint, unnecessary:

> "As far as tanker operations are concerned, the discharge criteria in the regulations prohibit any discharge of [dirty ballast] within 50 miles of land, so ballasting operations will not seriously damage the environment in 'these ecologically sensitive waters' as the comment alleges" (*id.* at 8-9).[13]

[13]The Coast Guard took express note of the Alaska coast: "The permit agreement between the Department of the Interior and Alyeska Pipeline Corporation stipulates that ships loading there [Valdez] will discharge all oily residues ashore and that shore reception facilities will be provided. This satisfies demands for such a standard on this trade without influencing international acceptance of the [1973] Marine Pollution Convention due to unilateral U.S. action." *1975 Coast Guard EIS*, at 60c.

During its 1979 rulemaking proceedings under the PTSA, the Coast Guard again considered and rejected more stringent limitations on the discharge of ballast water from cargo tanks. In first proposing regulations, the Coast Guard announced its intention to exempt from segregated ballast retrofit requirements existing crude carriers of less than 70,000 DWT equipped with crude oil washing systems. *See* 44 Fed. Reg. 8984, 8985 (1979). Inasmuch as they authorized such vessels to continue ballasting and deballasting from cargo compartments, these proposed regulations met with strong opposition from a number of coastal states and environmental groups.[14] The Coast Guard dismissed these objections. In addition to jeopardizing the United States' ability to promote international agreement, the Coast Guard observed that attainment of a zero-discharge standard for all crude carriers in excess of 20,000 DWT by requiring the use of SBT in lieu of COW was not cost effective:

> "[I]t is important to balance cost and benefits, especially when inflation is considered the major national problem in the United States. This proposed regulatory action [the SBT/COW option for crude carriers under 70,000 DWT] reduces oil pollution by about the same amount as . . . proposals [requiring SBT], but at about ⅓ of the cost." *1979 Coast Guard EIS*, at 147.

It is thus apparent that Alaska's deballasting prohibition represents an attempt to override the Coast Guard's judgment that an across-the-board zero-discharge standard would be diplomatically unwise, technically impractical and environmentally unnecessary. Nonetheless, the court of appeals dismissed this manifest conflict, principally because it viewed the preemption issue as having been settled by the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1976) (the "CWA"). The court construed the CWA as expressly empowering the states to impose discharge limitations applicable to deballasting. It reached this conclusion by observing that under Section 1342 the states are empowered within their own waters to administer locally the National Pollutant Discharge Elimination System ("NPDES") by establishing their own effluent discharge limitations, which may be more stringent than federal standards (App. A, *infra*, at 10a). By then assuming that Alaska's deballasting prohibition constituted an effluent limitation promulgated under the Act, the court reasoned that "the Alaska statute at issue in this case is converted by the CWA into a federal standard which the EPA is required to enforce" (*id.* at 13a-14a). Because it viewed the Alaska statute as thus having the force of federal law, it concluded that, as to deballasting, the CWA "demonstrates a congressional intent that there be joint federal/state regulation of ocean waters within three miles of shore" (*id.* at 12a).

The essential premise of the court's reasoning — that Alaska's deballasting prohibition is part of the NPDES permit system and thus has the force of federal law — is flatly wrong. It is true that under Section 402 of the CWA the states may assume responsibility for developing and administering a permit system within their waters and, further, that the states' permit requirements may be more stringent than those adopted by the EPA as national minimums. *See* 33 U.S.C. § 1342(b)(1) (Supp. III 1979). Alaska, however, has never sought to develop and administer its own NPDES permit system (*see* BNA, *Env't Rep.* [State Water Laws], at 611.0111). More importantly, the authority of the states extends only to the regulation of activities "covered by [EPA] regulations" (40 C.F.R. § 122.1(f) (1983)). And in construing

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[14] For example, noting that "[t]he most direct way to limit the release of oil to the sea during deballasting is simply never to mix oil with ballast water," one commentator protested the elimination of the mandatory segregated ballast requirement, particularly for the U.S. coastwise trade "where a significant fraction of voyages are relatively short hauls of Alaskan or OCS [Outer Continental Shelf] crude." *See 1979 Coast Guard EIS*, at 119, 123 (comments of the Center for Law and Social Policy).

the reach of the CWA, as is its nondiscretionary duty, *see National Resources Defense Council, Inc. v. Costle,* 568 F.2d 1369, 1375-77 (D.C. Cir. 1977), the EPA has expressly exempted from the NPDES permit requirements "any . . . discharge incidental to the normal operation of a vessel" (40 C.F.R. § 122.3(a) (1983)). Thus, contrary to the assumption of the court below, federal law does not endorse state regulation of deballasting as a matter of federal water pollution policy; it expressly disavows it.[15]

Even were this exclusion to be ignored, the fact remains that in enacting the permit provisions of the CWA, Congress did not intend to authorize the states to override federal judgments made under other statutory schemes that address discrete aspects of the marine pollution problem. The permit provisions of the CWA, originally enacted in 1972 as the Federal Water Pollution Control Amendments to the Water Quality Act of 1970, Pub. L. 92-500, 86 Stat. 816 (1972) (the "FWPCA"), represented a federal response to the deterioration of the states' coastal and inland waters and, equally, to the states' historic failure to take adequate remedial measures. *See* S. Rep. No. 92-44, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3671-75. Thus, Congress authorized the establishment of minimum federal water

[15]In denying the petition for rehearing, the court of appeals dismissed as "far-fetched" petitioners' construction of 40 C.F.R. § 122.3(a) as exempting from the scope of the CWA, and hence from the NPDES permit system, the discharge of ballast by a vessel (App. D, *infra*, at 68a). However, as documented in the record below, the EPA has *never* required a NPDES permit as a condition for the discharge of ballast by an oil tanker. The EPA's construction of the CWA, which is entitled to great deference (*see, e.g., Haviland v. Butz,* 543 F.2d 169, 174 (D.C. Cir.), *cert. denied,* 429 U.S. 832 (1976), *quoting Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969)), is also consistent with the position taken by the United States as amicus curiae throughout the proceedings below: "[U]nder 33 U.S.C. § 1342 [the CWA] and the implementing regulations vessels are excluded from the requirement to have an NPDES permit for discharge incidental to normal operation." Brief of Amicus Curiae, United States of America, at 22 n. 7, *Chevron U.S.A., Inc. v. Hammond,* 726 F.2d 483 (9th Cir. 1984); Brief of the United States as Amicus Curiae, at 14 n. 9, *Chevron U.S.A., Inc. v. Hammond,* No. A-77-195 (D. Alaska Sept. 18, 1979).

quality standards and effluent limitations covering a wide spectrum of water pollution sources to serve as a national benchmark. Mindful of the states' traditional responsibility to protect the environmental integrity of their respective waters, Congress carefully crafted the Act so as not to oust state regulation of water pollution so long as those efforts were consistent with minimum federal standards. To remain unaffected, however, was the primacy of the federal government under other statutory schemes in the regulation of specific industrial activities potentially contributing to the water pollution problem. Thus, as Representative Price noted during floor debate of the FWPCA:

> "[The FWPCA] is far reaching and pervasive in its effect on water quality, *but it was not intended to amend other basic enabling statutes* . . . . This bill is not the appropriate vehicle for amending a major piece of legislation, thoroughly considered in committee and by the Congress, which established at the direction of the Congress a thorough and pervasive regulatory program . . . ." Environmental Policy Div., Cong. Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess. 556 (1973) (Comm. Print) (emphasis added).[16]

[16]Indeed, the language of the FWPCA demonstrates a congressional intent to leave undisturbed the preemptive effect of federal regulations promulgated under different statutory schemes. Thus, Section 511(a) of the CWA, 33 U.S.C. § 1371(a)(1) (1976) expressly prohibits the Act from being construed as "limiting the authority or functions of any officer or agency of the United States under any other law or regulation." Further evidence is provided by the language by which Congress made the CWA non-preemptive. Thus, in Section 510, Congress declared: "*[N]othing in this chapter*" shall preclude the states from adopting a standard respecting the discharge of pollutants (33 U.S.C. § 1370 (1976) (emphasis added)). By limiting non-preemption to the CWA itself, Congress made clear its intention to leave unaffected preemption that would result from any other federal regulatory effort. *See Minnesota v. Hoffman,* 543 F.2d 1198, 1208 (8th Cir. 1976), *cert. denied,* 430 U.S. 977 (1977) ("[Section 510] does not purport to grant the states any new authority . . . . Thus it [only] prevents the Amendments from pre-empting the States from adopting higher pollution control standards"); *Opinion of the Justices,* 379 A.2d 782, 788 (N.H. 1977).

In construing the CWA to empower the states to override federal regulations promulgated under the PWSA/PTSA, the court below also violated a fundamental tenet of statutory construction. The CWA is a statute of general applicability with no greater focus on deballasting than on any other activity that might contribute to water pollution. Indeed, the CWA is entirely silent on the subject of deballasting; the words "ballasting" and "deballasting" nowhere appear. In contrast, the PWSA/PTSA deals expressly with oil tanker deballasting. In view of this, the court of appeals' conclusion that the CWA is evidence of Congress' intent to permit conflicting state-federal deballasting regulation under the PWSA/PTSA runs afoul of the principle that "a statute dealing with a narrow, precise, and specific subject is not submerged by a . . . statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

II.

STATE DEBALLASTING PROHIBITIONS SUCH AS THE ALASKA STATUTE ARE INIMICAL TO THE COAST GUARD'S ABILITY TO PROMULGATE RATIONAL, COHERENT DEBALLASTING REGULATIONS AND TO PROMOTE INTERNATIONAL AGREEMENT

A. Coast Guard Regulation. Pursuant to congressional directives, the Coast Guard has evolved a mix of interrelated and complementary design, equipment and operational standards for the control of ballast-related pollution depending on a vessel's size, age and cargo.[17] As noted earlier, for most new tankers, the federal government has adopted predominantly a design solution, requiring segregated ballast on new crude oil carriers in excess of 20,000 DWT and new product carriers in excess of 30,000 DWT. For larger existing vessels, the Coast Guard has opted for a combination of redesign and equipment standards, requiring that existing product carriers in excess of 20,000 DWT eventually be retrofitted with SBT or CBT, and existing crude carriers in excess of 20,000 DWT with SBT or COW. The control of ballast-related pollution from vessels not exceeding these thresholds has been undertaken with a combination of equipment requirements and operating rules. Such vessels are permitted to discharge dirty ballast only beyond 50 miles of land, in prescribed quantities, at prescribed rates and under carefully monitored conditions. Within 50 miles of land, only clean ballast may be discharged, and the deballasting must be monitored by equipment meeting Coast Guard specifications. Finally, pursuant to Section 5(7)(N) of the PTSA, 46 U.S.C.A. § 3709 (West Supp. 1983), the Coast Guard has developed a program for exempting vessels from SBT, CBT and COW requirements in those situations in which it determines that "shore-based reception facilities are a preferred method of handling ballast." *See* 33 C.F.R. §§ 157.300-.310 (1983).

To permit coastal states such as Alaska to override these federal judgments by developing their own, conflicting deballasting controls would not only deprive the Coast Guard of its ability to balance the competing technological, environmental and economic interests, but also would fatally undermine the phased implementation of a rational and coherent federal solution to the deballasting problem. For example, current Coast Guard regulations require owners of existing vessels to purchase and install elaborate equipment such as crude oil washing systems, oil discharge monitors and above-the-water piping systems solely so that, when discharged, the ballast

[17] In addition to requiring the Coast Guard to undertake "the reduction or elimination of discharges during ballasting [and] deballasting," PTSA § 5(6)(A)(vii), 46 U.S.C.A. § 3703(a)(7) (West Supp. 1983), Congress has also directed the agency to solicit the views of interested parties, including state and local governments, *id.* § 5(6)(C), 46 U.S.C.A. § 3703(c), and to balance competing interests by basing its standards upon "the best available technology . . . unless clearly shown that [such standards would] create an undue economic impact which is not outweighed by the benefits to . . . protection of the marine environment," *id.* § 5(1)(D), 46 U.S.C. § 391a(1)(D). The Coast Guard has also been directed to take a "system approach" to the regulation of ballast-related pollution; *i.e.*, to develop a regulatory scheme balanced by an appropriate mix of design, equipment and operational solutions formulated with due regard for differences among the vessels it is charged with regulating. *See* S. Rep. No. 92-724, 92d Cong., 2d Sess. 13-14, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2766, 2773-74.

water they carry in cargo compartments will have sufficiently low level amounts of oil as not to pose any substantial environmental risk. Flaunting these standards, Alaska dictates that *no* ballast water be discharged from cargo tanks. Vessel owners are thus caught in a regulatory "tug-o'-war" in which they are compelled by the Coast Guard to purchase and install elaborate equipment that is rendered purposeless by Alaska.

The unacceptability of a state ballasting prohibition is most vividly revealed, however, by looking not only at what the Alaska law prohibits but also at what it effectively requires. The first of the three alternatives available for vessel owners operating under a deballasting prohibition is to retain all ballast water on board and, upon arrival at a loading point, to discharge ballast into an onshore receiving and treatment facility. However, when it adopted its current design and equipment requirements and authorized the discharge of clean ballast within 50 miles of land, the Coast Guard expressly considered and rejected the alternative of requiring shore-based treatment of all oil-bearing ballast. *See 1975 Coast Guard EIS*, at 47 (questioning the availability and environmental effects of on-shore reception facilities). Thus, the continued enforcement of segregated ballast and/or crude oil washing requirements is predicated upon the judgment that mandatory recourse to shore-side facilities for all oily mixtures is not ordinarily preferable to other approaches to the deballasting problem. This is evident from § 5(7)(N) of the PTSA, which authorizes the Coast Guard to waive these requirements on a case-by-case basis if it determines that shore-based reception facilities "are the preferred method of handling ballast and that adequate facilities are readily available." 46 U.S.C.A. § 3709 (West Supp. 1983). Congress has thus expressly committed the responsibility for assessing whether to regulate the discharge of ballast from cargo tanks, or whether instead to permit the use of shore-based facilities, to the considered discretion of the Coast Guard. It is flatly inconsistent with this congressional scheme to permit a coastal

state to supplant the Coast Guard's judgment in determining when shore-side facilities are a preferable method of dealing with ballast-related pollution.[18]

Moreover, permitting states to take the narrow view in a misguided effort to maximize the protection of their coastal waters (by imposing a universal onshore facility requirement) poses a threat to the environmental integrity of the high seas. The Coast Guard has determined that shore-based facilities are most suitable for processing dirty ballast, tank washings and other oily mixtures having an oil content substantially greater than that found in clean ballast. *See* U.S. Coast Guard, Proposed Rules On Vessels and Oil Transfer Facilities, 42 Fed. Reg. 32670, 32671 (1977). To the extent that these facilities are pressed into service to treat clean ballast, they will be less available for processing more hazardous oily mixtures; and in the absence of adequate shore-based treatment capacity, additional oily ballast will likely end up being discharged on the high seas. *Id.* While Alaska may be willing to accept this trade-off, the protection of the marine environment from deballasting both along the coast and outside of the territorial waters is the responsibility of the Coast Guard. To the extent that the high seas should be compromised for the benefit of the coastal waters, clearly it is the Coast Guard

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[18]Further, across-the-board state requirements for the use of shore-based facilities present the real possibility of conflicting state and federal judgments. For example, under the scheme established by the Coast Guard in 33 C.F.R. Part 157, prior to issuing a design and equipment exemption, the Coast Guard must be satisfied that the reception facility is "adequate and will remain readily available;" "that the reception facility will discharge a high quality effluent;" and that "the reception facilities handling exempted vessels continue to meet the needs of the other vessels using them, without causing undue delay [six hours or more] to those vessels." U.S. Coast Guard, Proposed Regulations Exempting Vessels from SBT, CBT and COW Requirements, 45 Fed. Reg. 34306, 34307-08 (1980); *see* 33 C.F.R. § 157 Subpart F (1983). Enforcement of a state deballasting prohibition such as Alaska's would permit a state to override the Coast Guard's judgment even in situations where, in the Coast Guard's view, consideration of these relevant factors affirmatively militates against the use of shore-side facilities.

and not each of the coastal states that should make this judgment.[19]

Alternatively, a state deballasting prohibition can be viewed as a requirement that only vessels having segregated ballast capacity be allowed to operate within the state's waters. As such, it is no more compatible with the Coast Guard's responsibilities under the PWSA. In the first place, as the Supreme Court held in *Ray*, the establishment of design standards is the exclusive responsibility of the Coast Guard. And as noted before, in discharging this responsibility, the Coast Guard has determined that certain classes of vessels can operate without segregated ballast capacity with no significant risk to the marine environment — principally new and existing product carriers of less than 30,000 DWT and 40,000 DWT respectively, existing crude oil tankers of less than 70,000 DWT that are equipped with crude oil washing systems, and all tankers of less than 20,000 DWT.

The unacceptability of permitting a state such as Alaska to override these federal judgments and in effect to promote the use of segregated ballast becomes most evident when existing crude oil carriers are considered. In affording owners of such tankers the option of installing either segregated ballast or crude oil washing systems, to a large extent the Coast Guard created an incentive for the use of crude oil washing, which it determined would more significantly contribute to the protection of the marine environment.[20] As it explained in its *1979 Coast Guard EIS*:

[19]The use of shore-side treatment facilities is not the environmental cure-all that the court of appeals seemed to think. As a representative of environmental groups noted during the Coast Guard's 1975 rulemaking: "The creation of shore-side reception facilities may merely transfer marine pollution problems to the shore and, in fact, . . . concentrations of oil pollution in a specific shore-side location may be more harmful environmentally than regulated discharges at sea. Further, their creation may pose substantial land use problems and have serious secondary impacts in the areas in which they are located." *1975 Coast Guard EIS*, at 150 (comments of the Center for Law and Social Policy).

[20]In addition to more thoroughly scouring a cargo compartment, *see* note 12, *supra*, COW permits a vessel more effectively to employ the "load on top" ("LOT") method of tank cleaning, which significantly reduces oil inputs on the high seas. Ordinarily when tanks are washed with a water medium, the tank flushings are discharged as dirty ballast beyond fifty miles of land, and a new load of ballast taken on board which can be discharged in port as clean ballast. When used in conjunction with COW, LOT involves pumping the water used to rinse crude-oil washed tanks into a holding tank, where the oil-water residue is allowed to decant. Water is then pumped overboard from the bottom of the tank until the oil-water interface is reached. The oil remaining in the holding tank is then combined with the next cargo (hence, load on top) or combined with other slops for eventual discharge into a shore-based reception facility. According to Coast Guard estimates, COW has the potential of eliminating 440,000 metric tons per year of operational outflows by reducing dirty ballast discharges as well as tank cleaning inputs. *See 1979 Coast Guard EIS*, at 46.

> "[Although t]he SBT option would be more effective than COW on oil outflows as a result of ballasting operations, . . . SBT provides almost no help for other operations such as tank cleaning or sludge removal prior to shipyard operations. Looking at the vessel population affected by the proposed action, it is estimated that deletion of the COW option would cause an additional oil outflow of 11,600 metric tons/year." *1979 Coast Guard EIS*, at 55-56.

The only remaining alternative for complying with a deballasting prohibition is the replacement of the tank vessel with tank barges, which need not deballast from cargo tanks. This is another policy issue beyond the competence of the states. Within some quarters of the maritime industry, the use of barges in lieu of tankers is seriously questioned as a preferred method of protecting the marine environment. In rough seas such as those frequently encountered off the Alaska coast, barges are more prone to loss and resultant catastrophic pollution. *See* 1979 Coast Guard Rules, at 66506. While Alaska's officials may be willing to dismiss this concern, balancing these types of competing interests must be the exclusive responsibility of the Coast Guard, not of each of the coastal states.

B. International Treaty-Making. Enforcement of state deballasting prohibitions such as Alaska's is also inimical to an express congressional goal of the PWSA/PTSA and a cornerstone of the Coast Guard's program for the regulation of deballasting: promotion of international solutions to the problem of ballast-related pollution.[21] It is no accident that federal regulations to control pollution resulting from ballasting and deballasting largely track standards adopted by the international community. The rules adopted by the Coast Guard in 1975 respecting segregated ballast for new tankers and the controlled discharge of ballast from cargo tanks of existing vessels were purposely extracted from the results of the International Conference on Marine Pollution, convened during October 1973 under the auspices of the Inter-Governmental Maritime Consultative Organization ("IMCO") (hereafter "1973 Marine Pollution Convention"). *See* 1975 Domestic Trade Rules, at 48280.[22] The Coast Guard followed the same course when in 1976 it extended the 1975 rules to foreign ships entering U.S. navigable waters and U.S. ships engaged in foreign trade. *See* U.S. Coast Guard, *Final Environmental Impact Statement, Regulations for U.S. Tank Vessels Carrying Oil In Foreign Trade and Foreign Tank Vessels that Enter the Navigable Waters of the United States* 3 (October 1976). And its more stringent pollution control standards promulgated in 1979 were drafted intentionally to parallel the rules adopted by IMCO's February 1978 International Conference on Tanker Safety and Pollution Prevention ("TSPP") (hereafter the "1978 MARPOL Protocol"). *See* 1979 Coast Guard Rules, at 66502.

[21]In its consideration of the PWSA, Congress recognized the desirability of promoting international agreement respecting vessel *operations* as well as design and construction standards. *See* S. Rep. No. 92-724, 92d Cong., 2d Sess. 23 (1972), *quoted in Ray*, 435 U.S. at 166 n. 16. *See also* PTSA § 5(1)(F), 46 U.S.C. § 391a(1)(F) (Supp. III 1979). Similarly, the Coast Guard has repeatedly underscored the importance of promoting international agreement on the subject of deballasting controls:

> "Because of tanker ownership and trade patterns and the international nature of world shipping, *international* control of oil inputs from tank cleaning and ballasting of tankers is absolutely essential." *1975 Coast Guard EIS*, at 61 (emphasis in original).

[22]The Coast Guard explained:

> "Ocean winds and currents do not observe national boundaries. Many of the ocean areas of greatest productivity of sea life lie in international waters beyond the jurisdiction of any nation. World shipping and trade in petroleum are international in scope, with only a small portion of the U.S. supply of petroleum being transported in ships of American registry. Therefore, ship source pollution problems are best attacked in an international context with unilateral action reserved for those circumstances when international solutions are impossible or inappropriate." 1975 Domestic Trade Rules, at 48280.

Despite this pattern of federal conformity with rules adopted by the international community, the court below concluded that unilateral departure by the coastal states respecting ballast discharge limitations would not jeopardize U.S. efforts to promote multinational agreement. It reasoned that, unlike vessel design standards, operating discharge limitations can vary from port to port without imperiling the ability of any nation's vessels to enter and operate within United States waters.[23]

Even to the extent the court of appeals' observation is true, a proliferation of state discharge standards different from those adopted by the United States and the international community would most certainly undermine U.S. efforts to promote multinational agreement. The Coast Guard expressly recognized this when during its 1975 rulemaking, which concerned only *U.S. carriers engaged in the domestic trade*, it acknowledged a need to conform its regulations to international standards. In response to criticisms that the

[23]Also in support of its conclusion, the court adverted to excerpts of the 1973 House debate concerning legislation to ratify the 1969 Amendments to the International Convention for Prevention of Pollution of the Sea by Oil, 1954 (App. A, *infra*, at 21a-23a). During this debate, one member of the House expressed the view that implementation of the treaty would not preclude contemporaneous regulation within the territorial sea under the Clean Water Act. These statements, however, hardly evidence a congressional intent to authorize *the various coastal states* to dictate unilaterally a U.S. departure from the international norm. Rather, they appear only to be a reference to provisions of the 1969 Amendments authorizing *signatory nations* to impose more stringent discharge limitations within their territorial seas.

world community could not conceivably object to more stringent standards applicable only to U.S. vessels serving U.S. ports, the Coast Guard wrote:

> "The Coast Guard believes U.S. coasts and waters cannot be adequately protected from oil pollution from tank vessels unless international agreement on methods of limiting oil inputs can be reached. Consistent with . . . Congressional direction . . . , this agency fully recognizes that the condition of this country's coasts and waters is directly linked to the condition of the rest of the world's oceans. The world's oceans will not be adequately protected if each nation adopts a 'go-its-own-way' approach." *1975 Coast Guard EIS*, at 179.

The Coast Guard more explicitly voiced concerns over the international ramifications of disparate pollution prevention regulation during its consideration of the 1979 rules. Noting that its proposed regulations were intended to implement the 1978 MARPOL Protocol, the Coast Guard stated: "If the U.S. were to enact regulations that go beyond or are not in agreement with the results of the TSPP conference, it is anticipated that there would be international reactions that could be harmful to the interests of the United States." *1979 Coast Guard EIS*, at 71.[24]

In short, given that the Coast Guard's regulatory efforts have been guided in large measure by the objective of achieving international uniformity respecting deballasting controls, there simply is no room for states such as Alaska to dictate unilaterally a U.S. departure from the international norm. To

[24]Specifically, the Coast Guard noted the likelihood: of jeopardizing the ratification of MARPOL and other existing agreements; of inducing "other countries to develop their own national standards which would be aimed at their own interest [and which] could have a serious effect on the free movement of vessels from one country to another;" of negating important innovations in international maritime law; of "weaken[ing] IMCO as a creditable international institution [and] weaken[ing] the United States' leadership role in . . . ongoing projects at IMCO;" and of "be[ing] seen as a breach of good faith [which] is likely to affect other negotiations on a wide variety of issues in which the U.S. has strong interests." *1979 Coast Guard EIS*, at 71-74.

permit them to do so would undoubtedly frustrate future U.S. efforts to encourage international acceptance of more stringent deballasting controls; for the United States would be powerless to assure other maritime nations that, when calling upon U.S. ports, their vessels would not be subject to even more rigorous limitations than foreign countries impose on U.S. vessels calling at their ports.

Of greater immediate concern, a proliferation of state deballasting prohibitions threatens to render the United States in breach of its obligations to the international community under the 1978 MARPOL Protocol. Under the Protocol, which prohibits vessels from discharging excessive quantities of dirty ballast and oily tank washings on the high seas, signatory nations are required to provide adequate shoreside reception facilities for such wastes but not for clean ballast. *See* U.S. Coast Guard, Advance Notice of Proposed Rulemaking Concerning Waste Reception Facilities, 48 Fed. Reg. 12395, 12397 (1983). Congress ratified the Protocol only after receiving assurances from the Coast Guard and others "that providing for reception facilities is clearly a manageable problem, both economically and technically." H. Rep. No. 96-1224, 96th Cong., 2d Sess. 9, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4849, 4856. Pursuant to the Protocol, Congress passed implementing legislation (Act to Prevent Pollution From Ships, Pub. L. 96-478, 94 Stat. 2297 (1980) (*codified at* 33 U.S.C. §§ 1901-11 (Supp. V 1981))), which among other things requires the Coast Guard to certify the "adequacy of reception facilities of a port or terminal" (*id.* 33 U.S.C. § 1905(a)) and to "deny entry to a seagoing ship . . . [to a] port or terminal . . . not hold[ing] a valid certificate" (*id.* 33 U.S.C. § 1905(e)).

The premise of the 1978 MARPOL Protocol, Congress' implementing legislation and the ongoing Coast Guard program for certifying ports and terminals is that seagoing vessels *will* discharge clean ballast at sea and that shore-based facilities need be made available only to receive dirty ballast and other hazardous wastes. State deballasting prohibitions,

however, will necessarily require that such facilities also accept clean ballast, leaving them unavailable to receive wastes which the Protocol prohibits from being discharged at sea. Otherwise adequate facilities will readily become inadequate, requiring the Coast Guard to turn away both U.S. and foreign flag vessels from ports and terminals that in all other respects meet the international standards. In ratifying the 1978 MARPOL Protocol, Congress clearly did not anticipate or sanction such state nullification of an international agreement of which the United States was the principal sponsor and architect.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-3700, D.C. CV 77-195

CHEVRON U.S.A., INC., *et al.*,

Plaintiff-Appellees,

and

INTERCONTINENTAL BULKTANK CORPORATION, *et al.*,

Intervening Plaintiffs-Appellees,

vs.

JAY S. HAMMOND, Governor of the State of Alaska, *et al.*,

Defendants-Appellants,

and

CORDOVA DISTRICT FISHERIES UNION, *et al.*,

Intervening Defendants-Appellants.

Appeal from the United States District Court
for the District of Alaska,

Hon. James M. Fitzgerald, District Judge, Presiding

Argued and Submitted: August 18, 1982

Opinion

Filed: February 3, 1984

Before: PREGERSON, ALARCON, and NELSON, Circuit Judges

PREGERSON, Circuit Judge:

Alaska Statute § 46.03.750(e) (1976)[1] prohibits oil tankers from discharging ballast into the territorial

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[1] Cargo in tank vessels ... engaged in the marine transportation of crude oil, refined petroleum products or their by-products may not be placed in segregated ballast tanks, nor may ballast be placed in cargo tanks of those tank vessels having segregated ballast systems. However, the department may by regulation permit the placing of ballast in the cargo tanks of those vessels in emergency situations. *All ballast*

waters of Alaska if that ballast has been stored in the vessel's oil cargo tanks. On appellees' motion for partial summary judgment, the district court invalidated this Alaska statute. The court ruled that the statute is preempted by Coast Guard regulations promulgated under Title II of the Ports and Waterways Safety Act of 1972, *as amended by* the Ports and Tanker Safety Act of 1978 (PWSA/PTSA), 46 U.S.C. § 391a (Supp. V. 1981). We reverse.

BACKGROUND

Unloaded oil tankers must take on seawater for ballast to ensure proper submergence and vessel stabilty. Upon arrival in port, the tankers must then discharge this ballast — i.e., "deballast" — before loading their cargo tanks with oil. Ballast held in empty oil tanks will contain oil residue. Both the state and federal governments have been concerned about the danger to the marine environment caused by regular pumping of large quanities of oil-polluted ballast into the ocean.

During the past three decades, the federal government has sought to minimize environmental harm from oil tankers through a series of increasingly stringent statutes and international conventions. These measures cover many aspects of tanker safety, design, and traffic control. They also encompass measures designed to prevent accidental oil spills and authorize the Coast Guard to regulate deballasting. Pursuant to this authority, Coast Guard regulations prohibit deballasting from oil cargo tanks within fifty miles of shore. 33 C.F.R. §§ 157.29, 157.37(a)(1) (1982). An exception is made, however, for the carefully monitored discharge of so-

placed in cargo tanks shall be processed by or in an onshore ballast water treatment facility and may not be discharged into the waters of the state.

Alaska Stat. § 46.03.750(e) (1976) (emphasis added).

called "clean" ballast. 33 C.F.R. § 157.43(a). "Clean" ballast is that which "if discharged from a vessel that is stationary into clean, calm water on a clear day would not produce visible traces of oil on the surface of the water or on adjoining shore lines . . . ." 33 C.F.R. § 157.03(e)(1).

This deballasting prohibition and exception promulgated by the Coast Guard were first conceived by an international body in 1969, as part of amendments made that year to the 1954 International Convention for the Prevention of Pollution of the Sea by Oil.[2] Two subsequent major international agreements also considered tanker pollution problems, including those caused by deballasting. They are the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) and the Protocol of the 1978 International Conference on Tanker Safety and Pollution Prevention (the MARPOL Protocol). *See* 33 U.S.C. §§ 1901-1911 (Supp. V 1981) (the enabling legislation to the MARPOL Protocol). The PWSA/PTSA and attendant Coast Guard regulations — including the deballasting standard at issue in this case — are based in large part upon MARPOL and the MARPOL Protocol. Although MARPOL, the MARPOL Protocol, and the PWSA/PTSA made significant advances in a number of other areas of pollution control, no changes were made to the "clean" deballasting exception originally adopted by the 1969 convention.[3]

[2]See note 20 for the text of the 1969 amendments relating to the deballasting prohibition and exception, as enacted by the Oil Pollution Act Amendments of 1973 (OPAA), Pub. L. No. 93-119, 87 Stat. 424, *codified at* 33 U.S.C. §§ 1001-1016 (1976), *repealed and superseded by* Act of Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297 (1980), *codified at* 33 U.S.C. §§ 1901-1911 (Supp. V 1981).

[3]Although the PWSA/PTSA is based in large part on the international agreements discussed in our opinion, the specific deballasting standard promulgated internationally in 1969 is not spelled out in the PWSA/PTSA. That statute does, however, give regulatory authority over deballasting to the Coast Guard, 46

The PWSA/PTSA and the international conventions also addressed environmental problems posed by deballasting by requiring increasingly stricter design features and operational equipment on tankers. For example, new tankers of a certain size are required to have separate tanks to be used for ballast only and to have crude oil washing systems to clean the cargo tanks. 46 U.S.C. § 391a(7); 33 C.F.R. §§ 157.09(2), 157.35. In some respects, the PWSA/PTSA and Coast Guard regulations are even more stringent than international standards. For example, the PWSA/PTSA imposes design requirements on ships smaller than those covered by the MARPOL Protocol. 46 U.S.C. § 391a(7)(A). The Coast Guard, however, has never adopted a more restrictive definition of "clean ballast" and continues to enforce the same standards originally introduced by an international convention in 1969.

Meanwhile, the Alaska legislature has determined that even the small amount of oil contained in ballast meeting the federal definition of "clean" causes harm to the Alaskan marine environment. Thus, Alaska Stat. § 46.03.750(e) provides that absolutely no ballast water that has been held in oil cargo tanks may be discharged into the waters of the state. Absent an emergency, all tankers must use on-shore facilities to process ballast water containing oil.

DISCUSSION

In addressing the issue of federal preemption presented by this case, we divide our discussion into two major inquiries.[4] In the absence of express preemption

U.S.C. § 391a(6)(A)(vii) (Supp. V 1981), which has exercised this authority by adopting regulations, 33 C.F.R. §§ 157.03(e)(1), 157.29, 157.37(a)(1) & 157.43(a), consistent with the 1969 international deballasting standards.

[4]This two-tier inquiry was specifically espoused by the Supreme Court in *Silkwood v. Kerr-McGee Corp.*, ___ U.S. ___, ___, ___ S. Ct. ___, ___ (1984).

language, we first address the threshold question whether Congress in passing the PWSA/PTSA implicitly intended to occupy the field of regulating pollution from oil tankers within a state's territorial waters. In determining Congressional intent, relevant subjects include the Supreme Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); comprehensiveness of federal regulations; consideration of state police power; congressional intent that there be collaborative federal/state efforts to protect the marine environment; need for uniform regulation; history of regulation of the subject matter; and available legislative history. After addressing the threshold question, we conclude that Congress in passing the PWSA/PTSA did not intend to occupy the field of regulating pollution from oil tankers within a state's territorial waters. Having concluded that Congress did not intend to foreclose all state legislation in this field, we then address the second major question whether the Alaska statute is nonetheless void because it actually conflicts with the PWSA/PTSA and implementing Coast Guard regulations. On this critical issue, after considering the need to find actual conflict, the importance of reconciling the statutory schemes, and the objectives of the federal and state legislation, we conclude that no such conflict exists.

I. *In Passing the PWSA/PTSA, Did Congress Implicitly Intend to Occupy the Field of Regulating Oil Tanker Pollution Within a State's Territorial Waters?*

The PWSA/PTSA contains no explicit expression of congressional intent to preempt state law regulating oil tanker pollution within a state's territorial waters. Therefore, we must apply principles of preemption analysis to the challenged state statutory provision to determine implicit legislative intent. In this task, we

are assisted by the fact that ours is not the first case to examine the preemptive effect of the PWSA/PTSA on state law. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Supreme Court examined the effect of the PWSA on a number of Washington statutes, including provisions requiring certain design safety features for tankers operating in Puget Sound. The Court held that these "design requirements, standing alone, are invalid in light of the PWSA and its regulatory implementation." 435 U.S. at 160-161. After examining the PWSA's comprehensive scheme for regulating tankers, the Court found that Congress had entirely occupied the field as to tanker design requirements:

> This statutory pattern shows that Congress, insofar as *design characteristics* are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.

435 U.S. at 163 (emphasis added).

The Court's finding of preemption is specifically limited to the regulation of vessel "design characteristics" and thus does not control the outcome of the present case involving ocean pollutant discharges.[5] As a matter

[5]In *Ray*, the Court addressed a number of preemption issues under both Titles I and II of the PWSA. As Ray explains, "[t]he focus of Title I, 33 U.S.C. §§ 1221-1227, is traffic control at local ports; Title II's principal concern is tanker design and construction." 435 U.S. at 161. For purposes of our preemption analysis, Title II is the relevant portion of the PWSA/PTSA because the Act's deballasting provisions are found there. 46 U.S.C. § 391a. *Ray* found several parts of Washington State's tanker provisions preempted by the PWSA, but did so primarily in the area of traffic control governed by Title I. In reaching its ruling, the Court was governed by Title I's express preemption language. 435 U.S. at 158-59, 171-75. The Court's sole preemption finding under Title II was confined to design specifications. 435 U.S. at 168.

of fact, the court specifically explained that tankers must meet "otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." 435 U.S. at 168-69. Even though *Ray* does not control the outcome of the present case, in addressing the preemption issue, we nonetheless are guided by the analytical approach followed in *Ray*. This approach recognizes the significance of the subject matter regulated. As we stressed in *Morseburg v. Balyon*, 621 F.2d 972 (9th Cir. 1980), the subject matter of regulation is critical in preemption analysis. Therefore, in making a preemption analysis, a court should examine those concerns emphasized by Congress in enacting the subject legislation.

> When the emphasis is to protect and strengthen national power, "occupation" and "conflict" are easily found while not so easily found when the emphasis is to promote federalism.
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> ....
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> ... [T]he choice of emphasis is heavily influenced by the area of the law in which the issue arises. Thus, when the area concerns foreign affairs, as in *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941), or labor relations, as in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), the emphasis, not surprisingly, is on the national interest, while when the area is protection of consumers of commodities, as in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), the emphasis under-

standably is upon the state's interest particularly and the imperatives of federalism generally. . . .

621 F.2d at 976-77.

There are significant differences between the subject matter regulated in *Ray*—vessel design features—and that regulated here—ocean pollutant discharges. *Ray* recognizes these differences. As to design features, the Court noted that it "[had] previously observed that ship design and construction standards are matters for national attention." 435 U.S. at 166 n.15. The subject matter of environmental regulation, on the other hand, has long been regarded by the Court as particularly suited to local regulation.[6] *Ray* confirms this distinction: "We do not question in the slightest the prior cases holding that enrolled [those engaged in domestic or coastwise trade] and registered [those engaged in foreign trade] vessels must conform to 'reasonable, nondiscriminatory *conservation and environmental protection measures' . . . imposed by a State.*" 435 U.S. at 164 (emphasis added) (citations omitted).

As the foregoing discussion makes clear, the holding of *Ray*, which involved a subject matter different from that involved here, cannot be applied mechanically to control the disposition of the present case. Thus, because *Ray* is not dispositive of the preemption issues presented by this case, we must now specifically inquire,

[6]In another preemption case, albeit one in which the federal legislation contains express non-preemption language, the Supreme Court specifically acknowledged the importance and appropriateness of state regulation of oil pollution. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court indicated that it disfavored "allow[ing] federal admiralty jurisdiction to swallow most of the police power of the states over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent." 411 U.S. at 328-29.

as a threshold matter, whether Congress, when it passed the PWSA/PTSA, implicitly intended to occupy the field of regulating the discharge of pollutants from tankers within a state's territorial waters.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), cautions that "we start with the assumption that the historic police powers of the States were not to be superseded by [federal legislation] unless that was the *clear and manifest* purpose of Congress." 331 U.S. at 230 (emphasis added). We must also keep in mind that "[t]he exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 203 (1952). The justification for such caution is that Congress certainly has the power to "act so unequivocably as to make it clear that it intends no regulation but its own." *Rice*, 331 U.S. at 236. Furthermore, if we are left with a doubt as to congressional purpose, we should be slow to find preemption, "[f]or the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943). Quoting *Rice*, 331 U.S. at 230, the Court in *Ray* noted ways in which congressional intent may manifest itself:

> [The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference tht Congress left no room for the States to supplement it.... Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

435 U.S. at 157 (citations omitted).

In our quest to determine whether Congress implicitly intended to occupy the field of regulating pollution caused by tanker deballasting within a state's territorial waters, we first note that on this subject the legislative history of the PWSA/PTSA is silent. But numerous other federal statutes provide convincing evidence of Congress' intent that, within three miles of shore, the protection of the marine environment should be a collaborative federal/state effort rather than an exclusively federal one. The PWSA/PTSA, which deals with a limited category of vessels and pollutants, is of course only a small part of the overall federal marine environmental protection scheme. The heart of the protection scheme is the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981) (CWA) (also known as the Federal Water Pollution Control Act or the FWPCA). Enacted contemporaneously with the PWSA, the CWA was designed to regulate the discharge of any pollutant into the nation's navigable waters. Its goal is eventually to eliminate all pollution. 33 U.S.C. § 1251(a)(1). The method of regulation chosen was a permit system known as the National Pollutant Discharge Elimination System (NPDES permit system), 33 U.S.C. § 1342, to be governed by minimum federal standards (effluent limitations), 33 U.S.C. § 1311. Under this system, the states maintain primary responsibility for abating pollution in their jurisdictions; they have authority to establish and administer their own permit systems and to set standards stricter than the federal ones. 33 U.S.C. §§ 1342(b), 1370. The role of the states is made clear by section 1251(b), which says: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution ...."

In *Pacific Legal Foundation v. Costle*, 586 F.2d 650 (9th Cir. 1978), *rev'd on other grounds*, 445 U.S. 198 (1980), this court commented that "there is strong support in the legislative history [of the CWA] for a conclusion that Congress wanted to encourage a federal-state partnership for the control of water pollution. Leg. History at 1279 (comments of Senator Montoya)." 586 F.2d at 657. Thus in the CWA Congress has clearly expressed its intent to allow the states to take an active role in abating water pollution.

This federal/state partnership in pollution regulation applies only to waters within the states' jurisdiction. Generally, the federal marine environmental protection scheme establishes a three-mile demarcation for states' authority over ocean pollution, and for most purposes —including pollution from vessels—the CWA applies only to the ocean within three miles of shore. U.S.C. § 1362(7)-(8), (12).

Pollution beyond the three-mile limit is covered under a number of statutes, the central one being the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-1444 (1976 & Supp. V 1981) (MPRSA). This law also employs a permit system for ocean dumping but *expressly* preempts state regulation of such dumping while allowing states to propose criteria to the Environmental Protection Agency (EPA). 33 U.S.C. §§1402(b) 1416(d).[7]

[7]Other federal statutes regulating ocean activity similarly use the three-mile demarcation. *See, e.g.*, Deepwater Port Act, 33 U.S.C. §§ 1501-1524 (1976 & Supp. V 1981) (Coast Guard in charge of deepwater ports outside the three-mile limit, but states given specific veto power over new licenses); Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1976 & Supp. V 1981) (provides concurrent state and federal jurisdiction within three miles and exclusive federal jurisdiction beyond); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1976 & Supp. V 1981) (provides for coordination of federal activities with state approved plans; state waters defined as territorial seas.) *See also*

The above authorities demonstrate a congressional intent that there be joint federal/state regulation of ocean waters within three miles of shore. Such joint regulation undermines the argument that Congress in enacting the PWSA/PTSA implicitly intended to occupy the field of regulating tanker pollution in a state's territorial waters.[8]

Secretary of the Interior v. California, ___ U.S. ___, ___, ___, S. Ct. ___, ___ (1984) (territorial seas extend for three geographic miles seaward from coastline).

[8]Appellees argue against reference to the CWA in determining intent under the PWSA/PTSA on the grounds that the CWA is a statute of general applicability only peripherally related to deballasting while the PWSA/PTSA is a more specific and more recent enactment. It is open to debate whether the more specific versus general principle applies when the "general" statute, the CWA, is actually one intended to subject all polluters to a comprehensive, detailed permit process directed at the pollutants sought to be discharged. In any event, principles of construction requiring the more recent and specific statute to prevail over the earlier and more general only apply when there is an irreconcilable conflict between statutes. *Watt v. Alaska*, 451 U.S. 259, 266 (1981); *In re Pacific Far East Line, Inc.*, 644 F.2d 1290, 1294 (9th Cir. 1981).

Furthermore, the court must seek to harmonize two potentially conflicting statutes: "We must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. at 267. This principle has been recently invoked in two of our decisions involving overlapping federal statutes in the areas of environmental regulation and management of marine resources. In *Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726 (9th Cir. 1978), we said:

> It is our obligation to so construe federal statutes so that they are consistent with each other, as by this means congressional intent can be given its fullest expression." [W]hen two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540 (1976), *quoting Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

586 F.2d at 729; *see also State of California v. Watt*, 683 F.2d 1253, 1263 (9th Cir. 1982), *rev'd on other grounds sub nom. Secretary of the Interior v. California*, ___ U.S. ___, ___ S. Ct. ___ (1984). Another decision presenting a question of statutory construction similar to the present case is *United States v. Dunn*,

Indeed, Congress has shown its high regard for the states' environmental concerns by providing that the CWA, through the NPDES permit system, will enforce state water quality standards stricter than the minimums required by the CWA. The CWA, 33 U.S.C. § 1311(b)(1)(C), requires that "there shall be achieved [within the three-mile limit] ... any more stringent limitation, including those necessary to meet water quality standards ... established pursuant to any state law or regulation ...."

Under another provision of the CWA, 33 U.S.C. § 1342(a)(1), a NPDES permit cannot be issued unless the requirements of section 1311 have been met. Further, the regulations implementing section 1342 provide that applicable state water quality standards shall be incorporated into the permit conditions along with other relevant effluent limitations. 40 C.F.R. § 122.62; *see also* 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 124.53(a), (e). Thus, absent preemption by another federal statute, such as the PWSA/PTSA, the Alaska statute at issue in this case

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545 F.2d 1281 (10th Cir. 1976). There the court construed two federal sentencing provisions, one incorporating state law as the CWA does, and the other providing additional federal sentencing authority. In harmonizing the provisions the court noted:

> The problem is one of construing two statutes, neither enacted in any obvious contemplation of the other but each bearing upon the other when both are involved in the factual situation presented. In such circumstances we should seek a solution which avoids violence to the terms of either but which brings both into correlation, since to construe either in isolation from the other would thwart the intention of Congress.

545 F.2d at 1282.

In the present case, as our opinion demonstrates, the PWSA/PTSA can coexist with the CWA, which adopts Alaska's deballasting statute through the NPDES permit system. Accordingly, we need not turn to those principles of statutory construction allowing one statute to supplant the other.

is converted by the CWA into a federal standard which the EPA is required to enforce.[9]

The CWA's non-preemption of Alaska's deballasting prohibition and the CWA's conversion of the prohibition into a federal CWA standard cannot insulate that prohibition against a challenge that it is preempted by the PWSA/PTSA. Nonetheless, the status of such state law under the CWA does provide convincing evidence of a well-settled congressional policy to promote a state's more stringent regulation of the local marine environment. The Supreme Court in *Ray* found that the regulation of the design or size of oil tankers was a subject matter in which there is an "evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." 435 U.S. at 165. In contrast,

[9]In dealing with the CWA the district court and the appellees focused their attention on the oil spill provisions of the statute. The CWA, however, regulates oil pollution under two separate schemes. The first is found in 33 U.S.C. § 1321, a statute specifically aimed at oil spills and their clean-up. The second is the NPDES permit system, 33 U.S.C. §§ 1311, 1342. The permit system more clearly demonstrates Congress' intent that there be federal/state collaboration in the regulation of pollutant discharges within the territorial waters.

Although both the oil spill provisions and the permit provisions of the CWA contain language explicitly stating that state laws are not to be preempted, 33 U.S.C. §§ 1321(o)(2), 1370, as discussed in the text of our opinion, the permit system goes further by providing that any permit granted for discharges within the three-mile limit must incorporate more stringent state water quality requirements.

Moreover, the general NPDES permit requirements apply in addition to any provisions, such as section 1321, governing a specific subject matter—oil discharges. *See United States v. Hamel*, 551 F.2d 107, 109-12 (6th Cir. 1977) (general permit provisions of section 1311 apply in addition to specific prohibitions concerning oil discharges contained in section 1321); *cf. Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977) (general permit provisions of section 1311 apply in addition to specific provisions of section 1343 pertaining to ocean pollution), *aff'd sub nom. Kilroy v. Quarles*, 614 F.2d 225 (9th Cir.), *cert. denied*, 449 U.S. 825 (1980).

our preceding discussion of the CWA demonstrates that Congress has indicated emphatically that there is no compelling need for uniformity in the regulation of pollutant discharges—and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums.[10]

[10]Ordinarily, courts seeking to determine implicit legislative intent confine themselves to the language and legislative history of the statute in question—here, the PWSA/PTSA. Authority exists, however, for looking at the entire federal statutory scheme relative to a particular subject matter, especially when that subject matter is dealt with under a number of separate enactments, some of which were enacted contemporaneously—as were the CWA and the PWSA. For example, in *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court construed the Equal Employment Opportunity Act and examined congressional intent regarding the continuation of Indian hiring preferences in the Bureau of Indian Affairs by reference to two other laws dealing with the same subject matter, but which were contained in different statutes and titles of the United States Code. Another example is *Silkwood v. Kerr-McGee Corp.*, ___ U.S. ___, ___ S. Ct. ___ (1984) where the Supreme Court looked to the legislative history and regulations of the Price-Anderson Act to determine congressional preemptive intent in the earlier enactment of the Atomic Energy Act.

Particularly where two federal statutes have overlapping areas of regulation, as do the CWA and PWSA/PTSA, it is permissible and helpful to examine the history and context under which they were enacted. This history and context may include other statutes, executive orders, hearings of legislative committees dealing with the subject matters of regulation, and, as in this case, pertinent international agreements and statutes adopting them. For other examples of the use of such materials in construing ambiguous statutes, see *Silkwood*, ___ U.S. at ___, ___ S. Ct. at ___; *Watt v. Alaska*, 451 U.S. at 270-79; *Morton*, 417 U.S. at 550-55; and *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 644 (1973).

In *Ray*, 435 U.S. at 178 n.28, the Court rejected an argument that the CWA demonstrates congressional intent for coexistent regulation of tanker design. Unlike *Ray*, this case involves subject matter squarely within the ambit of the CWA and is therefore clearly and properly distinguishable. The *Ray* footnote does not control this case for the same reason that *Ray's* holding does not control this case—*Ray* is specifically and narrowly confined to a different subject matter.

Appellees contend that the comprehensiveness of the PWSA/PTSA provides evidence of preemptive federal intent. But comprehensiveness alone is not enough to demonstrate a federal intent to occupy the entire field. The CWA—which allows concurrent state regulation—is as comprehensive in its regulation of pollution as the PWSA/PTSA is in its regulation of tankers.

As the Court stated in *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973):

> We reject . . . the contention that preemption is to be inferred merely from the comprehensive character of the federal . . . provisions . . . . The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem . . . .

As with the work incentive program considered in *Dublino*, the prevention of harm to the marine environment from oil tanker operations is a complex subject matter in which "a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent." 413 U.S. at 415. Appellees stress that the legislative history of the PWSA/PTSA is clear about the necessity for a "systems" approach to tanker-caused oil pollution, based on a "mix and match" method of balancing and choosing among various regulatory options—some aimed at design, some at traffic control, others at vessel operation. That legislative history, however, may stand equally for the proposition that the problem of tanker-caused pollution is complex, must be approached from many angles, and requires a diversity of solutions. S. Rep. No. 724, 92d Cong., 2d Sess. 13-14, *reprinted in* [1972] U.S. Code Cong. & Ad. News 2766, 2773-74. The complexity and

comprehensiveness of federal marine environmental regulation are particularly appropriate without regard to the question of preemption because these regulations must "be sufficiently comprehensive to authorize and govern programs in States which had no . . . requirements of their own as well as cooperatively in States with such requirements." *Dublino*, 413 U.S. at 415.

Appellees further argue that only "one single decisionmaker" can perform the necessary balancing and choosing in this "mix and match" system of regulation. They rely on that portion of the PWSA/PTSA, 46 U.S.C. § 391a(1)(D), which directs the Coast Guard to perform a cost-benefit analysis by applying "the best available technology . . . unless clearly shown to create an undue economic impact which is not outweighed by the benefits . . . ." The weighing and balancing required in the CWA is, if anything, even more delicate and complex than in the PWSA/PTSA.[11] Yet, in the CWA Congress determined that such decisionmaking could co-exist with the opportunity for states to set stricter standards.

While design standards need to be uniform nationwide so that vessels do not confront conflicting requirements in different ports and so that the Coast Guard can pro-

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[11]Under the CWA, the EPA must balance costs and benefits, with reference to the following factors set forth in 33 U.S.C. § 1314(b)(1)(B):

> Factors relating to the assessment of best practicable control technology currently available to comply with . . . Section 1311 of this title [on effluent limitations] shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

mote international consensus on design standards, there is no corresponding dominant national interest in uniformity in the area of coastal environmental regulation.[12] Here, in fact, the local community is more likely competent than the federal government to tailor environmental regulation to the ecological sensitivities of a particular area.

In preemption analysis, we should also consider whether the potential effect of the challenged state statute on international matters gives rise to a preemptive federal interest. In this case, the potential effect of Alaska's deballasting statute on international trade is easily distinguished from the effect of the state tanker design provisions invalidated in *Ray*. Although national uniformity and international consensus are critical concerns in the establishment of tanker design standards, those concerns are not essential in the regulation of pollutant discharges into coastal waters. Once a ship is constructed, it cannot meet new or different

[12]Of course, as to environmental regulation of deep ocean waters, the federal interest in uniformity is paramount. Such regulation in most cases needs to be exclusive because the only hope of achieving protection of the environment beyond our nation's jurisdiction is through international cooperation. These considerations do not, however, apply to the waters of the territorial seas which lie within three miles of shore and which can be subject to both federal and state enforcement. The distinguishing factors here are analogous to those considered in the first Supreme Court opinion on preemption:

> Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), *quoted in City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 at 625 (1973).

design requirements in various ports. A ship's discharge of pollutants can, however, be varied according to environmental standards and conditions in different jurisdictions. Hypothetically, state regulation regarding the discharge of pollutants could possibly interfere with the establishment of nationally uniform design requirements. But, for the most part local environmental regulations can co-exist—as they do here—with federal regulations without impinging on the exclusively federal concerns of vessel design and traffic safety.[13]

[13]Consider, for example, the regulation of marine sanitation devices and their discharges under the CWA. Sewage from vessels is one of two specific exemptions from the permit system of the CWA. 33 U.S.C. § 1362(6). Sewage from vessels is exclusively regulated under 33 U.S.C. § 1322. Under this section of the CWA, the EPA, after consulting the Coast Guard, sets standards for the performance of marine sanitation devices. The Coast Guard then promulgates consistent regulations covering design, construction, and operation of such devices. 33 U.S.C. § 1322(b)(1). The Coast Guard has the exclusive authority to regulate these devices, but states are free to determine that their waters require greater protection and may prohibit discharge of any sewage from vessels if the EPA determines that adequate facilities are reasonably available for removal and treatment. 33 U.S.C. § 1322(f)(3). Local prohibition of the discharge of sewage from vessels as allowed by section 1322 has been applied to foreign vessels without adverse results on international trade and has been held not to intrude on the constitutional treaty-making powers of the United States. *Lake Carriers' Ass'n v. Kelley*, 527 F. Supp. 1114, 1130-31 (E.D. Mich. 1981), *aff'd*, 456 U.S. 985 (1982).

We note in passing that in section 1322 Congress carved out an area of regulation otherwise covered by the NPDES permit system, including applicable state standards, and placed part of it within the exclusive domain of the Coast Guard. The fact that Congress did not do the same for the discharge of pollutants from tankers demonstrates its intent to regulate deballasting under both the effluent limitations and permit sections of the CWA (and the state standards incorporated therein) as well as under the PWSA/PTSA.

We repeat that we are not holding that state standards under the CWA could never impermissibly interfere with the Coast Guard's exclusive domain. Even the language of the CWA itself recognizes this possibility by requiring NPDES permits to incor-

Moreover, the PWSA/PTSA does not mandate strict international uniformity. Although the legislative history of the PWSA/PTSA refers to congressional intent to abide by international agreements regarding the regulation of tankers, S. Rep. No. 92, 92d Cong., 2d Sess. 23, *reprinted in* [1972] U.S. Code Cong. & Ad. News 2788-89, the statute nonetheless gives the Coast Guard specific authority to establish stricter standards than those set by international agreements, 46 U.S.C. § 391a(6). This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction.

More important to the question at hand, the following legislative history of the Oil Pollution Act Amendments of 1973, Pub. L. No. 93-119, 87 Stat. 424 (OPAA),[14] approving the 1969 amendments to the 1954 International Convention for Prevention of Pollution of the

porate Coast Guard regulations regarding the "safe transportation, handling, carriage, storage, and stowage of pollutants." 33 U.S.C. § 1342(g). The general regulatory picture, however, is one of congressionally intended cooperation and collaboration between the Coast Guard and the combined federal/state regulatory authorities under the CWA. *See, e.g.*, 33 U.S.C. § 1321(b)(2)(A), (b)(3), (b)(6)(A) & (b)(6)(B) (allocating division of labor among the various regulatory bodies specified in the CWA provisions on hazardous substances and oil spills).

[14]Although enacted by Congress, the effectiveness of the Oil Pollution Act Amendments of 1973 (OPAA), Pub. L. No. 93-119, 87 Stat. 424, *codified at* 33 U.S.C. §§ 1001-1016 (1976), *repealed and superseded by* Act to Prevent Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297, *codified at* 33 U.S.C. §§ 1901-1911 (Supp. V 1981) (enabling legislation of the MARPOL Protocol of 1978), was contingent on ratification of amendments to the international convention by a certain number of nations. The condition was never fulfilled. The substance of the OPAA, however, has been incorporated into the MARPOL Protocol of 1978, which the United States ratified by the Act to Prevent

Sea by Oil, expressly refers to the possibility of stricter standards to be set under the CWA. The OPAA announced standards for deballasting near shore identical to the standards subsequently promulgated by the Coast Guard in 1975—the very same standards at issue here. Representative Clausen and Representative Dingell, floor manager of the legislation, specifically discussed the applicability of stricter state standards within the three-mile limit of the territorial seas and the exclusivity of Coast Guard regulation beyond three miles.

> MR. CLAUSEN. Mr. Speaker, the next question will relate to enforcement proceedings beyond the territorial sea.
>
> Will this come under the Environmental Protection Act?
>
> MR. DINGELL. No, this will be administered under the statute. We are considering that it will be administered by the Coast Guard, and it will be handled in that fashion.
>
> MR. CLAUSEN. Well, what about on the Continental Shelf itself?
>
> MR. DINGELL. This is within the territorial sea. The Federal Water Pollution Act [CWA] will apply, and they will apply the more stringent standards, so that we could well have application as to vessels, tank and dry cargo and other vessels, both under international agreement and also under this particular statute.

Pollution from Ships, Pub. L. No. 96-478, 94 Stat. 2297 (1980), *codified at* 33 U.S.C. §§ 1901-1911 (Supp. V 1981) (the MARPOL Protocol of 1978). The MARPOL Protocol will not become effective until the requisite number of signatory nations have ratified the protocol.

> MR. CLAUSEN. So for the territorial sea the Environmental Protection Act would control it pretty much?
>
> MR. DINGELL. The Federal Water Pollution Control Act [CWA], as amended would apply.

119 Cong. Rec. 14,588 (1973).

And again in the same debate Representative Clausen stated that the CWA is to apply in conjunction with the federal adoption of international standards:

> Last year, we went as far as we could go by including in the Water Pollution Control Act [CWA] stringent controls prohibiting the discharge of oil in our territorial waters.
>
> ....
>
> This bill complements our efforts to control oil pollution within the 3-mile territorial sea by implementing the International Convention for the Prevention of the Pollution of the Sea by Oil.
>
> Through the adoption of this measure we will be prohibiting the discharge of any oil up to 50 miles at sea and more stringently regulating any discharges beyond that distance.
>
> ....
>
> Mr. Speaker, this legislation continues the long string of efforts we have made to make certain our water pollution control programs are both continuously updated and responsive to changing needs. In conjunction with the Water Pollution Control Act [CWA] it will help reduce and control pollution and I urge the House to give it overwhelming support.

119 Cong. Rec. 14,590 (1973).[15] Because the CWA incorporates stricter state standards, this legislative history demonstrates a congressional intent that state regulation of discharges proceed in conjunction with Coast Guard regulation of deballasting within the territorial seas. As the PWSA/PTSA covers subject matter parallel to that covered by the international agreement and amendments that were the focus of the OPAA, the legislative intent expressed by Representatives Clausen and Dingell should be equally applicable to the PWSA/PTSA.[16] Thus, we conclude Congress intended that stricter state standards for oil pollution within three miles of shore be enforced in addition to Coast Guard regulations issued under the PWSA/PTSA.

The above discussion shows that, unlike tanker design features controlled by *Ray*, there is no need for strict uniformity in regulating pollutant discharges into the territorial waters. To the contrary, Congress has repeatedly recognized the need for collaborative federal/state regulation of the marine environment within three miles of shore. Thus, we find that the federal marine environ-

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[15] *See also The 1973 Inter-Governmental Maritime Consultative Organization Convention on Marine Pollution from Ships [MARPOL]: Hearings Before the Senate Committee on Commerce*, 93d Cong., 1st Sess. 9 (1973) (comments of former EPA Administrator Russell Train):

> [W]ith respect to discharges, the United States believes it is important because of its own high standards to maintain the freedom of action to establish higher standards under the Federal Water Pollution Control Act [CWA] if it desires.

This provides a clear statement that the EPA recognizes, even after passage of the PWSA, that oil pollution from tankers is subject to regulation under the CWA.

[16] The legislative history of the PWSA/PTSA establishes that it is based in large part on MARPOL and the MARPOL Protocol (which incorporated the deballasting standards of the OPAA), and is intended to be construed consistently with them, except where expressly stated to the contrary. H.R. Rep. No. 1384, 95th Cong., 2d Sess. 21, *reprinted in* [1978] U.S. Cong. & Ad. News 3270, 3289.

mental protection scheme as a whole does not prohibit stricter state standards regulating water pollution in a state's territorial waters, but in fact, through the CWA, would enforce those standards. Moreover, nothing inherent in the comprehensiveness or complexity of the regulations under the PWSA/PTSA implies a preemptive intent on the part of Congress as to the regulation of deballasting within three miles of shore. Finally, the legislative history of the OPAA, the statute which embodied congressional approval of the 1969 amendments to the 1954 International Convention for Prevention of Pollution of the Sea by Oil, contains express floor debate remarks that stricter standards under the CWA are to apply within three miles of shore. We therefore hold that, in enacting the PWSA/PTSA, Congress did not implicitly intend to occupy the field of regulating discharges of pollutants from tankers into a state's territorial waters.

II. *Is the Alaska Statute Void Because it Actually Conflicts with the PWSA/PTSA and Implementing Coast Guard Regulations?*

Having found that Congress did not intend complete occupation of the field of regulating pollution from oil tankers within a state's territorial waters, we now address the question whether Alaska Stat. § 46.03.750(e) is void because it actually conflicts with the PWSA/PTSA and implementing Coast Guard regulations.

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it *actually conflicts* with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility ...," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963), or where

> the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941) ....

Ray, 435 U.S. at 158 (emphasis added) (other citations omitted). The question is whether there is an "irreconcilable conflict between the federal and state standards." *Silkwood v. Kerr-McGee Corp.*, ___ U.S. ___, ___, ___ S. Ct. ___, ___ (1984) *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 126 (1973), cautions us that in conducting our inquiry we must be "mindful ... of the purposes behind" the potentially conflicting statutes:

> [W]e may not overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties. Our analysis is also to be tempered by the conviction that the proper approach is to reconcile "the operation of both statutory schemes with one another rather than holding one completely ousted."

414 U.S. at 127, *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Moreover, state law should be preempted "'only to the extent necessary to protect the achievement of the aims of the [federal act in question].'" *Merrill, Lynch*, 414 U.S. at 127, *quoting Silver*, 373 U.S. at 361.

As required by *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), we first proceed to determine whether the legislative objectives of the PWSA/PTSA clash with those of Alaska's deballasting statute adopted by the CWA through the NPDES permit system. The purpose of both the Alaska deballasting prohibition and the CWA is the same: to eliminate damage to the marine environment from the discharge of pollutants into the nation's waters. Several places in the legislative history of the

CWA refer to a "no discharge policy" or "zero-discharge goal." S. Rep. No. 414, 92d Cong., 2d Sess. (1971), *reprinted in* [1972] Code Cong. & Ad. News 3668, 3676; S. Conf. Rep. No. 1236, 92d Cong. 2d Sess. (1972), *reprinted in* [1972] Code Cong. & Ad. News 3668, 3777. The preamble of the CWA establishes that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1). As the House Report stated in discussing the effluent limitations section: "Any discharge of a pollutant without a permit . . . is unlawful." H.R. Rep. No. 911, 92d Cong., 2d Sess. 100 (1972), *quoted in Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977). Similarly, the Senate Report stated that 33 U.S.C. § 1311

> clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants . . . this legislation [CWA] would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes.

S. Rep. No. 414, 92d Cong., 2d Sess. 42 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News 3678, 3777, *quoted in Costle*, 568 F.2d at 1374-75.

Alaska's and the CWA's goal of protecting the ecological integrity of the territorial waters is entirely compatible with the purposes of the PWSA/PTSA as they relate to protection of the marine environment from the discharge of pollutants. Insofar as it assigns the Coast Guard the duty to regulate deballasting, the PWSA sought "to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting . . . ." 46 U.S.C. § 391a(7) (1976); *see* 46 U.S.C.

§ 391a(6)(A)(vii) (Supp. V 1981). As stated in the Senate Report on the PWSA, that Act was

> urgently needed legislation to cope with the increasing safety hazards of maritime transportation and with pollution resulting from operation and casualties of vessels carrying oil or other hazardous substances in bulk. Comprehensive legislation is needed to protect our coastal waters and resources including fish, shellfish, wildlife, marine and coastal Eco systems [sic] and recreational and scenic values. What is most urgently needed is legislation that will put the emphasis on *prevention*, and that is the thrust of H.R. 8140 [PWSA], as amended.

S. Rep. No. 724, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 2768-69 (emphasis in original). After the PWSA was passed, congressional dissatisfaction with measures to protect the environment continued, as evidenced in the House Report on the the PTSA, quoted in part as follows:

> Since the 1972 amendment of the Tank Vessel Act, the Coast Guard has proceeded rather slowly with the implementation of the revised provisions. On occasion, proposed regulations have been criticized as weak and ineffective, and the Coast Guard's reluctance to proceed expeditiously has resulted, in at least one occasion, in a law suit by environmental interests to mandate more rapid implementation by the Coast Guard.

H.R. Rep. No. 1384 — Part I, 95th Cong., 2d Sess. 5, *reprinted in* [1978] U.S. Code Cong. & Ad. News 3270, 3273.

To establish firmer controls to protect the environment, the PTSA was passed in 1978 with this strong policy statement:

(A) that the carriage by vessels of certain cargoes in bulk or in residue creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and to the adjoining land, including but not limited to fish, shellfish, and wildlife, marine and coastal ecosystems, and recreational and scenic values;

(B) that *existing standards for the design*, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of all such vessels which use any port or place subject to the jurisdiction of the United States or which operate in the navigable waters of the United States *must be more stringent and comprehensive for the mitigation of the hazards to life, property, and the marine environment.*

46 U.S.C. § 391a(1)(A)-(B) (emphasis added). Thus, the history of congressional action with regard to tankers demonstrates increasingly stringent protection of the marine environment.[17] Where both the legislative schemes of the PWSA/PTSA and the Alaska deballasting regulation as adopted by the CWA "reflect a policy choice favoring" the same goal — here the elimination of harmful ocean pollution — the court should be reluctant to infer preemption. "[I]t would be particularly inappropriate . . . because the basic purposes of the state statute and the [federal] Act are similar." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *accord William*

[17]Certainly the Alaska deballasting prohibition and the CWA provide a more absolute prohibition on pollutants than the PWSA/PTSA. But we must bear in mind that the Alaska prohibition and CWA are limited to the narrow three-mile band of coastal waters, and that the PWSA/PTSA must also deal with the high seas where the United States acts as a party to international agreements, rather than as a sovereign setting its own standards. *See supra* note 12.

Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1050 n.62 (9th Cir. 1981).[18]

[18]Appellees argue at length that the Alaska deballasting law has the same purpose as the PWSA/PTSA and that such coincidence leads inevitably to the conclusion of preemption. Similarity of purpose is listed as a test of preemption in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Coincidence of purpose, however, does not necessarily determine the preemption issue. As the Court stated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963):

> [I]t is suggested that the coexistence of federal and state regulatory legislation should depend upon whether the *purposes* of the two laws are parallel or divergent. This Court has, on the one hand, sustained state statutes having objectives virtually identical to those of federal regulations, *California v. Zook*, 336 U.S. 725, 730-731; *cf. De Veau v. Braisted*, 363 U.S. 144, 156-157; *Parker v. Brown*, 317 U.S. 341; and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar, *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152. The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

If this court had found as a threshold determination that the national interest in exclusively regulating the discharge of pollutants from tankers into the territorial waters was so pervasive and dominant that the federal government had occupied the field, then a finding of preemption would follow because the state regulation would "impair the federal superintendence of the field." Thus in *Ray*, once the Court found that "Congress intended uniform national standards for design and construction of tankers," it followed that the Washington State safety measures were void because they aimed "precisley at the same ends" as did "[t]he federal scheme." 435 U.S. at 163, 165. Similarly, in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973), the Court, having found that the "peculiarities and special features" of the aviation regulatory scheme require "a uniform and exclusive system of federal regulation," did not allow a minor local encroachment of excluding one night flight to a federally regulated airport.

In the present case, however, this court has held that under the PWSA/PTSA Congress did not intend to exclude completely state laws prohibiting pollutant discharges from tankers into the territorial waters of a state. As the *Exxon* and *Inglis* cases teach, in an area of collaborative federal and state regulation, coincidence

In examining the potential for conflict between the Alaska statute and the Coast Guard regulations under the PWSA/PTSA, we note at the outset that the state law prohibits acts that the federal regulations allow but do not require. That is, Coast Guard regulations allow the deballasting of "clean" ballast from cargo tanks, but do not require it. As we have stated, "[T]he possibility of proscription by [a state] of conduct that federal law might permit is not sufficient to warrant preemption." *William Inglis*, 668 F.2d at 1049; *see Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).[19] A finding of preemption is particularly inappropriate when the state is regulating conduct permitted by federal regulation, but only as an exception to a broad federal

of purpose actually militates against, rather than in favor of, preemption. "Where the Government has provided for collaboration the courts should not find conflict." *Union Brokerage Co. v. Jensen*, 322 U.S. 292, 209 (1944), *quoted in Merrill Lynch, Pierce, Fenner & Smith*, 414 U.S. at 137; *accord Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405 (1973).

[19]While state prohibition of conduct allowed by federal regulation may sometimes be preempted, such a conclusion requires greater evidence of preemptive intent than that present in this case. In *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, ___ U.S. ___, 102 S. Ct. 3014 (1982), the Court held that a California prohibition against due-on-sale mortgage clauses was preempted because federal regulations allowed federally chartered savings associations to use those clauses. There the federal agency had "unequivocally expresse[d] the . . . determination to displace state law," based on its finding that the use of due-on-sale clauses was "critical to 'the financial stability of' " the regulated institutions. ___ U.S. at ___, 102 S. Ct. at 3024 (citations omitted). By contrast, in the present case, while the Coast Guard apparently considered but chose not to impose a total prohibition on deballasting from cargo tanks, it did not make any specific findings that as to Alaskan waters such prohibition would seriously affect vital concerns for the safety of vessels or the environment. Here also, unlike *de la Cuesta*, the state is merely eliminating one exception to a general federal prohibition, rather than asserting authority over an area in direct conflict with overriding federal policy. In short, the state's deballasting prohibition coincides with the general federal policy that prohibits deballasting from cargo tanks except under very limited conditions.

prohibition. *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 132. As discussed *supra* at pp. 3, 4, and 17-20 [3a, 4a and 20a-24a], the Coast Guard's deballasting regulations are based on those adopted by a 1969 international convention. The terms of these deballasting rules as adopted by Congress in the 1973 OPAA establish clearly that the goal was to eliminate deballasting from cargo tanks within fifty miles of shore, with an exception carved out only for ballast that had been stored in a cleaned tank.[20]

The history of regulation under the PWSA/PTSA and the adoption of new international standards show a continuing effort to reduce the discharge of ballast from cargo tanks. The 1973 MARPOL and regulations

[20]33 U.S.C. §§ 1002 and 1004 were amended in 1973 by the OPAA to read as follows:

> Sec. 1002. Subject to the provisions of sections 1003 and 1004 of this title, the discharge of oil or oily mixture from a ship is prohibited unless —
>
> . . . .
>
> (2) for a tanker, except discharges from machinery space bilges which shall be governed by the above provisions for ships other than tankers —
>
> (i) the total quantity of oil discharged on a ballast voyage does not exceed one fifteen-thousandths of the total cargo-carrying capacity, and
>
> (ii) the tanker is more than fifty miles from the nearest land.
>
> Sec. 1004. Section 1002 of this title does not apply to the discharge of tanker ballast from a cargo tank which, since the cargo was last carried therein, has been so cleaned that any effluent therefrom, if it were discharged from a stationary tanker into clean calm water on a clear day, would produce no visible traces of oil on the surface of the water.

33 U.S.C. §§ 1002, 1004 (1976), *repealed and superseded by* 33 U.S.C. §§ 1901-1911 (Supp. V 1981) (enabling legislation of the MARPOL Protocol).

As described in the House Report to Pub. L. No. 96-478 (enacting the 1978 MARPOL Protocol) these 1969 international deballasting standards, codified at 33 U.S.C. §§ 1002, 1004, "generally prohibited all discharges from tankers within 50 miles of land." H.R. Rep. No. 1224, 96th Cong., 2d Sess. 3, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4849, 4850.

under the PWSA required all new vessels over 70,000 DWT (deadweight tons) to have segregated ballast tanks, and the vessels were prohibited from storing ballast in cargo tanks unless required by emergency weather conditions. 33 C.F.R. §§ 157.09(a), 157.35. The 1978 MARPOL Protocol extended the requirements to all new tankers over 20,000 DWT. Existing tankers over 40,000 DWT were required either to retrofit with segregated ballast tanks or to install a crude oil washing system. The PTSA increased the requirements as to existing tankers by imposing them on all tankers over 20,000 DWT. 46 U.S.C. § 391a(7)(A). In enacting the PTSA, Congress specifically ordered the Coast Guard to undertake "the reduction or elimination of discharges during deballasting . . ." 46 U.S.C. § 391a(6)(A)(vii). In the context of the general prohibition against cargo tank discharges within fifty miles of shore and the repeated changes in design requirements aimed at eliminating cargo-tank ballasting, it is difficult to argue convincingly that the Congress or the Coast Guard intended to create a federal right to discharge ballast containing oil into a state's coastal waters. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. at 132.

Although we conclude that the objectives of the Alaska statute do not conflict with those of the Coast Guard regulations under the PWSA/PTSA, we must nevertheless determine whether the facts of this case as alleged or conceded by appellees reveal an irreconcilable conflict when the Alaska statute and Coast Guard regulations are applied concurrently in Alaska territorial waters. Here again we must be guided by the Court's reluctance to entertain hypothetical conflicts because "[i]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and

federal regulation where none clearly exists.'" 437 U.S. at 130, *quoting Seagram & Sons v. Hostetter*, 384 U.S. 35, 45 (1966) (citations omitted).

No party asserts that it is physically impossible to comply with both the Alaska statute and the relevant Coast Guard regulations. Furthermore, the Alaska statute was amended in 1980 to make clear that it would not apply in cases where safety reasons dictated noncompliance. Alaska Stat. § 46.03.750(a)-(b).[21] Appellees argue that the Alaska regulation nevertheless conflicts with the PWSA/PTSA because it interferes with the delicate, cost-effective balance the Coast Guard has achieved among design and operational features by rendering some of the most expensive equipment, such as crude oil washing systems, superfluous. According to the affidavits submitted to the district court, the typical practice of tankers is to discharge dirty ballast beyond fifty miles, clean the tanks, take on new ballast and then discharge this "clean" ballast in port. If onshore treatment is required then arguably this two-step operation could be avoided and thus such design features as tank-washing equipment may be unnecessary. There appears to be room, however, for both the PWSA/PTSA and Alaska's deballasting regulations to operate purposefully. The tank-washing equipment would still be

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[21] (a) Except as provided in (b) of this section, a person may not cause or permit the discharge of ballast water from a cargo tank of a tank vessel into the waters of the state. A tank vessel may not take on petroleum or a petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast from cargo tanks into the waters of the state and the master of the vessel certifies that fact on forms provided by the department.

(b) The master of a tank vessel may discharge ballast water from a cargo tank of his tank vessel if it is necessary for the safety of the tank vessel and no alternative action is feasible to assure the safety of the tank vessel.

Alaska Stat. § 46.03.750(a)-(b).

necessary for vessels entering ports in other states which do not have a cargo-tank deballasting prohibition. *See Dublino*, 413 U.S. at 415. Furthermore, the legislative history of the bill enacting the 1978 MARPOL establishes the importance of crude oil washing systems even where there are segregated ballast tanks, because sludge builds up in the cargo tanks and reduces the amount of deliverable cargo. H.R. Rep. No. 1224, 96th Cong., 2d Sess. 5-6, *reprinted in* [1980] U.S. Code Cong. & Ad. News 4849, 4852. The tank-cleaning features could serve the further purpose of protecting the waters within fifty miles of shore from environmental damage that might be caused if ballast were released from a cargo tank during an emergency or accident. Finally, the tankers calling on Alaska's ports also may apply to the Coast Guard under 46 U.S.C. § 391a(7)(N) for exemptions from the required design features on the basis that adequate on-shore facilities exist to process all ballast water.[22]

[22]A similar superfluity argument was raised under the CWA in *Pacific Legal Foundation v. Quarles*, 440 F. Supp. 316 (C.D. Cal. 1977) *aff'd sub nom. Kilroy v. Quarles*, 614 F.2d 225 (9th Cir.), *cert. denied*, 449 U.S. 825 (1980). The CWA imposes two sets of criteria on ocean pollution: the first is the general effluent limitations and NPDES permit system; the second is a section specially referring to ocean pollution that prohibits any discharges that would "unreasonably degrad[e] the ocean environment." 440 F.Supp. at 324; *see* 33 U.S.C. § 1343 (1976). In *Pacific Legal Foundation*, the plaintiffs argued that only the latter section should be applied since the strict "secondary treatment" standard required under the general effluent limitations and permit sections would render the looser specialized ocean pollution criteria "comparatively useless" in most cases. 440 F.Supp. at 324. As in this case, Congress neglected to specify how these two environmental laws were to relate to each other. The court found that a limited role for the latter section could still exist and, after examining the legislative history, ruled that, considering the strength of congressional intent to eliminate pollution and the absolutist nature of the permit system's coverage, Congress intended both sets of criteria to apply concurrently. 440 F. Supp. at 322-26.

Appellees further argue that the Alaska statute conflicts with the PWSA/PTSA because it is an indirect design feature. Unlike the Washington State statute considered in *Ray*, Alaska has neither set out any required design features, nor has it even sought to impose different conditions on vessels not meeting preferred design criteria (as was held permissible under Title I of the PWSA by the Court in *Ray*, 435 U.S. at 173). Similar to the division of regulatory authority in 33 U.S.C. § 1322, discussed *supra* at note 13, Alaska has left all designing of vessels and equipment to the Coast Guard and has only prohibited the discharge of polluted ballast. While this requirement may impose some financial burden on the regulated vessels and require their owners to make some economic choices in order to comply, such a burden neither converts the discharge prohibition into a design feature nor justifies a finding of federal preemption.[23]

Finally, appellees and amicus argue that Alaska is unique in its ability to process ballast because of the existence of a huge, expensive processing facility at Valdez, built as part of the legislative compromise which

[23]Currently all tankers, except the *Alaska Standard*, using Alaskan ports are discharging cargo-tank ballast into on-shore processing facilities. Appellees attempt to convince us that the Alaska law effectively excludes the *Alaska Standard* from the state's waters because of a disfavored design feature that makes it difficult for the vessel to comply with the state's deballasting provision. The district court never reached this issue because it found that the PWSA/PTSA had preempted the field. Although there was some factual dispute at the district court over the relative merits and costs of alternative methods of compliance with the Alaska deballasting prohibition, even appellees concede that a range of alternatives exists, more than one of which would allow the *Alaska Standard* to continue to make all of its ports of call in Alaska. For example, its owner could build an on-shore processing facility at each port it visits, or could pump ballast onto a barge for transportation and later processing at an existing facility, or could retrofit the *Standard* with segregated ballast tanks.

allowed the Trans-Alaska pipeline to be constructed. They argue that other states do not have such large on-shore treatment capacity and that the Coast Guard has adopted its regulation allowing deballasting from cargo tanks because an across-the-board on-shore processing requirement would severely overload facilities in many areas of the country. 42 Fed. Reg. 32,671 (1977).[24] Although these considerations might lead to a different analysis in a future case dealing with another state's regulations, they are inapplicable here because Alaska has expansive on-shore processing facilities and no party has complained that enforcement of Alaska's deballasting regulation would cause the facilities to be overloaded.

We are guided here by the principles set forth in *Pacific Legal Foundation v. State Energy Resources, Conservation & Dev. Comm'n*, 659 F.2d 903 (9th Cir. 1981), *aff'd sub nom. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, ___ U.S. ___, 103 S. Ct. 1713 (1983):

> In applying preemption analysis, we "distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States ... *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise." *Goldstein v. California*, 412 U.S. 546, 554 .... There is no necessary conflict between [the state law under consideration] and federal law, and it will be time to consider any future conflicts if and when they arise.

[24]The only other evidence of this potential conflict that appellees present is an assertion by the Coast Guard in an Environmental Impact Statement, not made available to this court, voicing a similar concern regarding the adequacy and availability of on-shore processing facilities in some jurisdictions, but apparently lacking specific reference or finding as to Alaska.

659 F.2d at 925 n.35 (citations omitted) (emphasis in original).

CONCLUSION

Having determined that Congress did not intend to preclude all state regulation of the discharge of pollutants from tankers within three miles of shore, and finding no irreconcilable conflict between the regulation of deballasting under the PWSA/PTSA and the Alaska deballasting statute under the facts presented by appellees, we conclude that the Alaska statute may co-exist with Coast Guard regulations. Accordingly, the judgment of the district court is reversed insofar as it holds that the prohibition of discharge of ballast from cargo tanks into state territorial waters under Alaska Stat. § 46.03.750(e) is preempted by federal regulation and void under the Supremacy Clause of the United States Constitution.

This case is REVERSED and REMANDED to the district court with instructions to enter summary judgment in favor of appellants on the preemption issue presented in this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

No. A77-195-Civil

CHEVRON U.S.A., INC., *et al.*,
Plaintiffs,

and

INTERCONTINENTAL BULKTANK CORPORATION, *et al.*,
Intervening Plaintiffs,

vs.

JAY S. HAMMOND, Governor of the State of Alaska, *et al.*,
Defendants,

and

CORDOVA DISTRICT FISHERIES UNION, *et al.*,
Intervening Defendants.

Memorandum Decision

Filed: September 18, 1979

BEFORE HON. JAMES M. FITZGERALD, JUDGE PRESIDING

APPEARANCES: [Omitted]

In this phase of the litigation the parties[1] have addressed the following issues by way of motions for summary judgment:

A. Is the State of Alaska preempted under the Ports and Waterways Safety Act of 1972 and the Port and Tanker Safety Act of 1978 from enforcing and deballasting provisions of Chapter 226;

[1]The United States has filed an amicus brief addressing only the validity of the State's deballasting provisions. While recognizing the State's desire to make tanker operations environmentally sound, the federal government contends the State's deballasting provisions have been preempted by Title II of the Ports and Waterways Safety Act of 1972 as amended by the Port and Tanker Safety Act of 1978, P.L. 85-474, 92 Stat. 1471.

B. Can the State of Alaska constitutionally require tanker vessels operating under a federal license to obtain a state certificate of risk avoidance as a condition to navigating state waters;

C. Can the State of Alaska, in light of the Fourth and Fourteenth Amendments, undertake warrantless inspections of tank vessels?

This memorandum deals only with the preemption issue.

Chevron's moving papers and supporting affidavits establish that proper ballasting is essential to the safe operation of oil tankers. In simple terms, the process involves the replacement of cargo with ballast water in order that an unladen vessel may be submerged deeply enough to properly operate its power and navigational equipment, to minimize hull and bulkhead stress, and to insure proper vessel stability. Significantly, sea and weather conditions determine the proper amount of ballast required to assure ultimate seaworthiness.

The exact placement of ballast water in tankers is largely dependent upon individual vessel construction. In some tankers emptied cargo tanks are used to contain ballast water during unladen voyages while in others, ballast water is carried in tanks restricted to that purpose ("segregated" ballast tanks).

Prior to taking on cargo, all tankers must discharge ballast water to allow loading of the vessel to its designed capacity, regardless of whether ballast has been kept in cargo tanks or segregated ballast tanks. However, absent direct unloading of ballast water into an onshore treatment facility, any discharge of ballast water stored in cargo tanks will invariably contain some residual oil. As a result, the discharge of ballast water from cargo tanks must be reckoned with as a potential source of water pollution.

In dealing with deballasting as a source of pollution, the State of Alaska prohibits the discharge of ballast water from cargo tanks into state waters, imposing the requirement that ballast water be processed by an onshore ballast water treatment facility:

> Cargo in tank vessels ... engaged in the marine transportation of crude oil, refined petroleum products or their by-products may not be placed in segregated ballast tanks, nor may ballast be placed in cargo tanks of those tank vessels having segregated ballast systems. However, the department may by regulation permit the placing of ballast in the cargo tanks of those vessels in emergency situations. *All ballast placed in cargo tanks shall be processed by or in an onshore ballast water treatment facility and may not be discharged into the waters of the state.*[2] (Emphasis added)

Section 3, Chapter 226, SLA 1976; AS 46.03.750(e).

In addition, Alaska has established standards under the State Water Quality Act which limits the amount of oil which may be discharged by any vessel into state waters:

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[2]Other provisions further limit the operation of tanker vessels by prohibiting vessels from taking on petroleum as cargo unless the vessel's master certifies that during its voyage to or within Alaska the vessel has not discharged any ballast water having an oil content in excess of 50 parts per million. § 3, Chapter 120, SLA 1971 codified at AS 46.03.750(a)-(c).

In the Stipulation for Entry of Partial Final Judgment and Permanent Injunction, filed April 19, 1978, defendants conceded that the provisions of AS 46.03.750(e), quoted above, and the implementing regulations contained in 18 ACC 27.010(f) and (g), were invalid insofar as they attempt to regulate the placement of ballast water in cargo tanks. However, the validity of Alaska's requirements with respect to the discharge of ballast water from cargo compartments was left unaffected by that stipulation and was reserved for decision here. *See* Fourth Pretrial Order § 51.

> No person may pollute or add to the pollution of waters of the state by discharging from any vessel ballast water, tank-cleaning wastewater, or other waste containing petroleum in excess of the maximum permitted by the water quality standards established under §§ 70 and 80 of this chapter and in no event may a vessel discharge ballast water, tank-cleaning waste water or other waste containing petroleum in excess of 50 parts per million of oil residue.[3]

A.S. 46.03.750(a)

Both provisions purport to regulate tanker deballasting-related pollution of the "waters of the state," a term broadly defined in AS 46.03.900(22).[4]

Chevron challenges these statutes contending that in effect they prohibit normal tank vessel operations which are otherwise expressly permitted by federal and international law. Although United States Coast Guard regulations permit vessels to discharge "clean" ballast[5] from cargo tanks into all waters, Alaska prohibits any discharge into state waters of cargo tank-held ballast

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[3]AS 46.03.750(b) provides further that no vessel may take on petroleum as cargo unless it arrives in ports in the state without having discharged ballast at sea during the period of time from departure of the vessel enroute to the state from a port outside the state to arrival at a port in the state or while in transit between ports in the state.

[4]AS 46.03.99(22) defines "waters" in the following terms:

> (22) "waters" includes lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, straits, passages, canals, the Pacific Ocean, Gulf of Alaska, Bering Sea and Arctic Ocean, in the territorial limits of the state, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially in or bordering the state or under the jurisdiction of the state.

[5]The Coast Guard's definition of "clean" ballast is discussed at 33 C.F.R. § 157.03(e).

water. Moreover, while under certain conditions, Coast Guard regulations permit the discharge of "oily" ballast water at sea so long as the discharge occurs more than 50 miles from land,[6] Alaska imposes an additional requirement that ballast water have an oil content of no more than 50 parts per million. Thus, in rendering unlawful what federal law and international standards permit, Chevron contends the State has intruded into an area preempted from state regulation by Title II of the Federal Ports and Waterways Safety Act, as amended.[7] Additionally, Chevron argues, the State's prohibition of discharge of ballast water within state waters, with the companion requirement that ballast water be transferred into an onshore treatment facility, constitutes a substantial burden on the operation of tankers not equipped with segregated ballast compartments, thereby indirectly constituting a design requirement.[8]

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[6]33 C.F.R. § 157.29. Basically "oily" ballast water may only be discharged at a rate of less than 60 liters per nautical mile, and in a quantity limited to a prescribed fraction of the total former cargo.

[7]Pub.L. 92-340, 86 Stat. 427, July 10, 1972, Title II, § 201, codified at 46 U.S.C. § 391a amending the Tanker Vessel Act of 1936, Rev. Stat. § 4417a as added, 49 Stat. 1889, 46 U.S.C. § 391a. [Hereinafter "PWSA"].

[8]As the record now stands, resolution of Chevron's second preemption issue (that is, that Alaska's discharge prohibition constitutes an indirect vessel design and construction requirement committed exclusively to federal regulation under the amended PWSA) is precluded because of unresolved factual issues. However, as will become apparent *infra*, resolution of this argument is not necessary at this time.

As stated earlier, Chevron also challenges certain previously enacted provisions found in Section 3, Chapter 120, SLA 1971; AS 46.03.750(a)-(c). These provisions prohibit discharges containing in excess of 50 parts per mililon oil residue and further enjoin vessels which have discharged ballast at any time in their voyage from taking on oil within the state. A complimentary provision permits ballast discharges from segregated ballast tanks. These provisions are considered along with AS 46.03.150(e) below.

Alaska denies that federal law preempts state statutes here in question. Rather, Alaska maintains the discharge of ballast from tank vessels within the "waters of the state" and the territorial seas constitutes a "discharge of pollutants" under the Federal Water Pollution Control Act.[9] By that Act the discharge of ballast is subject to an intricate and comprehensive system of joint federal-state regulation.[10] Hence, the State concludes, Congress did not intend the contemporaneously-enacted PWSA to preempt state regulation of oil discharges into waters within its jurisdiction.[11]

Inasmuch as the State most heavily relies upon its perceived reserved authority under the FWPCA to regulate oil pollution, it is appropriate to begin with an analysis of that Act to determine the extent of federal and state responsibilities therein.

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[9]Pub.L. 92-500, 33 U.S.C. § 1251, *et seq.*, as amended. [Hereinafter "FWPCA"]. The Federal Water Pollution Control Act was originally enacted as the Act of June 30, 1948; June 30, 1948, c. 927, 62 Stat. 1155 and amended numerous times thereafter. *See* fn. 14, *infra* and accompanying text.

[10]According to the State, Congressional intent with respect to the state's role in controlling pollutant discharges is best summed up by the Senate Public Works Committee's report on the bill:

> For more than two decades, federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: *The states shall lead the national effort* to prevent, control and abate water pollution. As a corollary the federal role has been limited to support of, and assistance to, the states.

S. Rep. 92-414, 92nd Cong. 1st Sess. (1971), U.S. Code Cong. & Admn. News 3668, 3669. (Emphasis supplied).

[11]It is at once apparent that Alaska does not challenge the power of Congress to preempt the state in this field, but rather disputes the contention that Congress has done so through enactment of the PWSA.

THE FEDERAL WATER POLLUTION CONTROL ACT

It is true that for more than 20 years prior to enactment of the FWPCA, federal policy in the field of water pollution control was primarily keyed to the principle that the states should lead the national effort to prevent, control and abate water pollution. As a necessary corollary, the federal role was limited to support and assistance to the states. This principle was clearly reflected in the first federal water pollution control legislation enacted June 30, 1948[12] which assigned responsibility for enforcement in water pollution control to state governors. By contrast, federal agencies were authorized only to support research in water pollution and new technology, and to approve limited loans to assist in the financing of treatment plants.[13]

In the years between 1948 and 1972 the original 1948 Act was amended many times demonstrating the continued concern of Congress with pollution of the nation's waters.[14] During this period of time, the federal government gradually assumed an increasingly greater degree of participation and responsibility,[15] with the 1972 Amendments (FWPCA), marking a major step in this

[12]Act of June 30, 1948, c. 758, 62 Stat. 1155.

[13]Sen. Rep. 92-414 (1972) U.S. Code Cong. & Adm. News 3668, 3669.

[14]Act of July 17, 1952, c. 927, 66 Stat. 755; Act of July 9, 1956, c. 518, 70 Stat. 498; Act of June 25, 1959, Pub. L. 86-70, 73 Stat. 141; Act of July 12, 1960, Pub. L. 86-624, 74 Stat. 411; Act of July 20, 1961, Pub. L. 87-88, 75 Stat. 204; Act of Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903; Act of Nov. 3, 1966, Pub. L. 89-753, 80 Stat. 1246; Act of April 3, 1970, Pub. L. 91-224, 84 Stat. 91; Act of Dec. 31, 1970, Pub. L. 9-611, 84 Stat. 1818; Act of July 9, 1971, Pub. L. 92-50, 85 Stat. 124; Act of Oct. 13, 1971, Pub. L. 92-137, 86 Stat. 379; Act of Mar. 1, 1972, Pub. L. 92-240, 86 Stat. 47.

[15]It was to meet this need that in 1965 the Federal Water Pollution Control Administration was established within the Department of Health, Education and Welfare, to be later absorbed in 1970 by the newly-created Environmental Protection Agency.

direction. It can now be fairly said that these amendments reflect the substantial federal concern with pollution in the nation's waters while simultaneously recognizing the primarly responsibility of the several states to reduce and eliminate pollution and to plan the development and use of their land and water resources.[16]

By its express terms the FWPCA undertakes to allocate responsibility between federal authority and state authority according to the nature as well as the source of pollutants. State authority to enforce its own laws and regulations in particular areas dealing with control of pollutants under the FWPCA depends in some instances upon the level of the state's regulatory scheme. That is, in some instances if the responsible federal official (here the Administrator of the Environmental Protection Agency) determines that state standards of performance are the equal of required federal standards under the FWPCA, then the state is authorized by Congress to apply and enforce its own standards. So too, if a state fails to establish proper water quality standards or implementation plans, the federal administrator is authorized to do so by reason of the state's default.

The FWPCA contains extensive and detailed provisions relating to oil pollution from watercraft or vessels. These provisions first appeared in the Water Quality Improvement Act of 1970[17] (an earlier amendment to the 1948 Act) and were incorporated into the FWPCA in 1972, with the addition of provisions dealing with hazardous substances. These provisions now appear as 33 U.S.C. § 1321.

According to the expressed will of Congress respecting oil pollution, national policy is:

[16]*See* 33 U.S.C. § 1251(b).

[17]Pub. L. 91-224, 84 Stat. 91 (previously codified at 33 U.S.C. §§ 466m, 466n).

> ... there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States....

33 U.S.C. § 1321(b)(1).

In order to implement national policy, the President[18] was authorized to set permissible standards and:

> shall by regulation, to be issued as soon as possible after October 18, 1972, determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches.

33 U.S.C. § 1321(b)(4).

The FWPCA is a comprehensive statute dealing with many kinds of pollution from a number of sources, but all potentially affecting the nation's waters. Realistically, the FWPCA may be viewed as a grouping of regulatory schemes undertaking to deal with a broad spectrum of pollution. The detailed provisions contained in 33 U.S.C. § 1321 have to do only with a comprehensive regulatory plan to control pollution derived from oil and hazardous

[18]The presidential functions granted under 33 U.S.C. § 1321 were assigned in the main to the Administrator of the Environmental Protection Agency and the Secretary of the Department of Transportation (in which the U.S. Coast Guard operates). E.O. 11735, 38 Fed.Reg. 21243 (Aug. 3, 1973).

substances. This section contains specfic definitions[19] applicable only to oil and hazardous substances, a declaration of national policy and *includes express provisions relating* to preemption of state and local law.

For the purposes of 33 U.S.C. § 1321 Congress saw fit to place the responsibility of designating that which amounts to hazardous substances with the Administrator. Moreover, the discharge of oil and hazardous substances in such quantities as should be determined to be harmful by the President were prohibited. It is important to note that regulations issued under authority delegated to the executive in 33 U.S.C. § 1321 were required to be consistent with marine and navigation laws and regulations and with applicable water quality standards.

Other provisions of 33 U.S.C. § 1321 require all owners of vessels or onshore facilities discharging oil or hazardous substances into navigable waters to promptly notify the appropriate agencies of the United States of the discharge. The Secretary of Transportation, upon ascertaining the existence of a *discharge, is required to assess a civil penalty on behalf of the* United States. Extensive provisions were included within 33 U.S.C. § 1321 for clean-up of oil and hazardous substance discharge. For this purpose the President was requested to prepare and publish a national contingency plan enabling removal of oil and hazardous substances. The President, in his national contingency plan, was authorized to assign duties and responsibilities among the federal departments and agencies in coordination with state and local agencies and to include a system so that states affected by discharge of oil or hazardous substances might act when necessary to remove such discharge and obtain reimbursement from the national contingency fund. In addition to any other action taken by the state or local government, when there

[19]33 U.S.C. § 1321(a).

occurred an imminent and substantial threat to public health and welfare of the United States, the President was further authorized to cause the filing of an action to abate the threat of harm. In order to carry out his duties to prepare a national contingency plan, the President was directed to issue regulations consistent with maritime safety and marine and navigation laws:

> ... (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

33 U.S.C. § 1321 (j)(1).

In order to further implement the plan, a warrantless inspection procedure was authorized:

> (m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

33 U.S.C. § 1321(m).

Although the FWPCA contains a general provision whereby state authorities are not preempted from enacting or enforcing more stringent rules or regulations,[20] the Act further provides that certain express provisions contained elsewhere in the FWPCA are exceptions to that general provision. Provisions of 33 U.S.C. § 1321 dealing with oil and hazardous substances include express terms of preemption applicable only to that section:

> (c)(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.
>
> (3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

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[20] 33 U.S.C. § 1370:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

It has been held that the geographical extent of the jurisdiction of the Army Corps of Engineers under the Rivers and Harbors Act[21] is not coterminous with jurisdiction over navigable waters under the FWPCA; rather, the Ninth Circuit Court of Appeals held that Congress intended the FWPCA to have an extremely broad reach:

> It is clear from the legislative history of the FWPCA that for the purposes of that Act, Congress intended to expand the narrow definition of the term "navigable waters," as used in the Rivers and Harbors Act. This court has indicated that the term "navigable waters" within the meaning of the FWPCA is to be given the broadest possible constitutional interpretation under the Commerce Clause. [Citations deleted].

Leslie Salt Co. v. Froehlke, 578 F.2d 742, 754-755 (9th Cir. 1978).

Similarly, other courts which have examined the FWPCA have found in the Act explicit congressional intent to effect a broad sweep. In *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974) the court held that the FWPCA reached beyond navigable streams:

> It would, of course, make a mockery of those powers [of the federal government to control water pollution] if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the rivers could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

Ashland Oil, at 1326.

[21] 33 U.S.C. § 401.

In *Leslie Salt Co.* the Ninth Circuit Court of Appeals approvingly noted[22] the language and result in *United States v. Phelps Dodge Corporation*, 391 F.Supp. 1181 (D.C. Ariz. 1975) in which the District Court concluded that:

> For the purposes of [the FWPCA] to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into *any waterway*, including normally dry arroyos, where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters. [Emphasis in original].

Phelps Dodge, at 1187.

It is apparent from the face of the FWPCA and from the judicial interpretations that the Act mandates a far-reaching federal plan to bridle water pollution. While the legislation obviously contemplates some action by the states to control pollution, neither the Act nor the case law provide a foundation for the State of Alaska's position that Alaska's challenged legislation is protected under the FWPCA.

To sum up, close examination of the regulatory plan relating to pollution from oil and hazardous substances reveals that Congress intended to authorize the President, or his designee, the Secretary of the Department of Transportation and the Administrator of the Environmental Protection Agency to regulate and control discharge of oil and hazardous substances into navigable waters. 33 U.S.C. § 1321 speaks in terms of exclusive

[22] Leslie Salt Co. at 755.

federal jurisdiction over navigable waters reserving only to the states concurrent jurisdiction of those waters within a state. The definition of what is oil and hazardous substances is determined by federal authority, the establishment of a national contingency plan by the President, and the requirement that regulations promulgated by the President in this connection be consistent with maritime safety and with marine and navigation laws suggest the careful coordination and balancing of related interests.

THE PORTS AND WATERWAYS SAFETY ACT OF 1972 AS AMENDED BY THE 1978 PORT AND TANKER SAFETY ACT

The Ports and Waterways Safety Act of 1978 (PTSA) incorporated, modified and added to provisions of the Ports and Waterways Safety Act of 1972 (PWSA). As originally enacted, the PWSA was divided into two titles containing somewhat overlapping provisions designed to insure vessel safety and to insure the protection of the national navigable waters and resources from tanker cargo spillage.[23] Title I of the PSWA[24] authorized the Coast Guard to establish vessel traffic control systems to specify and require navigational equipment and to generally prescribe operating conditions. Title II[25] is concerned with protection of life, property and marine environment. Obviously both titles combine to form a comprehensive scheme for the regulation of all aspects of tanker vessel activities within federal navigable waters.

The legislative history of the PWSA reveals that a systems approach was desired:

[23]Ray v. Atlantic Richfield Co., 435 U.S. 151, 161 (1978).
[24]33 U.S.C. §§ 1221-1227.
[25]46 U.S.C. § 391a.

> . . . legislation limited solely to vessel traffic control, even when coupled with legislation such as the Water Quality Improvement Act of 1970 which authorizes the requirement of certain equipment, is inadequate to deal with the total tanker oil pollution problem. Certain causes, such as structural failure, explosions, fire, breakdown, etc., might best be dealt with through standards for the vessels themselves. *Similarly, pollution resulting from normal operations such as ballasting, bilge pumping, and tank cleaning, could probably not be adequately approached* through Title II of H.R. 8140 [enacted as Title I, PWSA] alone, but might require the adoption of design and construction standards. Other areas, such as collision and groundings, might best be attacked through a combination of vessel traffic controls and design and construction standards. For example, better vessel traffic controls might well prevent many groundings, while double bottom construction would lessen the likelihood of serious damage to the environment in those instances where groundings do occur. [Emphasis supplied].

Senate Report No. 92-724, 1972 U.S. Code Cong. & Admn. News, 2766, 2774.

The Secretary of the Department of the Interior was required under Title II of the PWSA to establish rules and regulations to govern all operations of tanker vessels.[26]

Extended analysis of the PWSA is particularly important to the present case since the issue of federal preemption of state authority was directly addressed by the United States Supreme Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). In *Ray* the Supreme

[26]Formerly codified at 46 U.S.C. § 391a (2).

Court undertook to determine the extent to which the PWSA preempted the State of Washington's tanker law.

According to the Court, the beginning point must be the assumption that the historic police powers of the states were not to be superceded by federal law unless such was the clear and manifest purpose of Congress. In referring to Title II of the PWSA, the Court concluded that the statutory pattern disclosed that insofar as design characteristics are concerned, Congress had entrusted the Secretary of the Department of Transportation with the duty of determining which oil tankers were sufficiently safe to be allowed to proceed in the navigable waters of the United States:

> . . . This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements. In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.

Ray v. Atlantic Richfield Co. at 163-164.

The Court went on to say that enforcement of state requirements would frustrate the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.

However, so far as Title I of the PWSA is concerned, the Secretary is authorized to regulate vessel traffic in congested waters under hazardous conditions by specifying times for vessel movement, by establishing size and

speed limitations and operating conditions to those vessels having the particular operating characteristics considered necessary for safe operation under the circumstances. Significantly, Title I authorizes but does not require the Secretary to issue regulations to implement provisions of that title. A state is precluded under Title I from establishing standards differing from those requirements or standards prescribed by the Secretary under authority delegated to him in Title I. Nevertheless, the Supreme Court made unmistakably clear that at such time as the Secretary should exercise his regulatory authority under Title I, state law is preempted to the extent that federal regulations apply.

Pursuant to Title I of the PWSA, the Coast Guard has established a vessel traffic system in Prince William Sound and the harbor at Valdez. State of Alaska laws or regulations in conflict with the Coast Guard system were conceded to be invalid in earlier proceedings of this case.

In *Ray v. Atlantic Richfield*, the Supreme Court commented on Title II of the PWSA in these terms:

> . . . That the Nation was to speak with one voice with respect to tanker-design standards is supported by the legislative history of Title II, particularly as it reveals a decided congressional preference for arriving at international standards for building tank vessels. The Senate Report further recognizes that vessel design "has traditionally been an area for international rather than national action," and that "international solutions in this area are preferable since the problem of marine pollution is worldwide.

Ray at 166.

The Coast Guard, under authority delegated to the Secretary in Title II of the PWSA, published regulations for the protection of the marine environment relating to

tanker vessels oil in bulk.[27] The amendments (PTSA) to the PWSA in 1978 specifically required the Secretary to issue regulations relating to ballasting, deballasting, tank cleaning and the like:

> ... for the design, construction, alteration, repair, maintenance, operation, equipping, personnel, qualification, or manning of vessels to which this section applies, as may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment. The Secretary may issue differing regulations applicable to vessels engaged in the domestic trade, and may also issue regulations that exceed standards agreed upon internationally. The regulations issued by the Secretary under this subsection shall be in addition to any other regulations, issued under other provisions of law, that may apply to such vessels. The regulations issued by the Secretary under this subsection shall include, but need not be limited to, requirements relating to
>
> (vii) the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity.

46 U.S.C. 391a (6), as amended.

Congress specifically included a statement of national policy in the PWSA as amended by the PTSA:

> ... The Congress hereby finds and declares —
>
> That the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but not limited to fish, shellfish, and wildlife, marine and coastal

[27] 33 C.F.R. § 157 *et seq.*

> ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the "marine environment".
>
> That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment.
>
> That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property, and the marine environment.

46 U.S.C. 391a (1).

Although the amended PWSA conceived of a broad national plan to combat actual and potential pollution, the Coast Guard was also mandated under the 1978 amendments to consider the views of interested federal departments and agencies as well as officials of state and local governments.[28] Additionally, the Coast Guard must insure that the minimum standards set by Congress were met.[29]

PREEMPTION

As noted, the Coast Guard, acting under Title II, PWSA authority,[30] promulgated and published comprehensive regulations regulating deballasting operations of tankers. Oily ballast water, as differentiated from "clean ballast", can be discharged only if the vessel (1) is more than 50 miles from the nearest land, (2) is proceeding

[28] PTSA, Sec. 12(b) 92 Stat. 1478 codified at 33 U.S.C. § 1231.

[29] 92 Stat. 1484 codified as 46 U.S.C. § 391a(7).

[30] PWSA, Title II § 201(3) and (7) as codified in 46 U.S.C. 391a.

enroute, (3) is discharging at a rate of oil content not in excess of 60 liters per miles, (4) discharges less than 1/15,000 of the total quantity of the former cargo of which the discharge is a part, (5) discharges above the waterline through a fixed piping system of specified design, and (6) is equipped with an operative automatic oil discharge monitoring and control system meeting Coast Guard specifications. 33 C.F.R. § 157.37 (a). Within 50 miles of the shoreline, and except in emergencies, tankers are prohibited from discharging "oily ballast" (dirty ballast) and are required to transfer such ballast to an onshore reception facility. 33 C.F.R. § 157.29.

In all other instances, within 50 miles of the shoreline, Coast Guard regulations expressly provide that "[c]lean ballast may be discharged" into any waters so long as vessels are equipped with an operative automatic oil discharge monitoring control system meeting Coast Guard specifications. 33 C.F.R. § 157.43(a)(6). Clean ballast is defined as "ballast in a cargo tank which, if discharged from a vessel that is stationary into clean, calm water on a clear day" would produce no visible trace of oil on, and cause no sludge or emulsion to be deposited beneath, the surface of the water or adjoining shorelines. 33 C.F.R. § 157.03(e).

The state has concurrent jurisdiction for certain purposes of the FWPCA over navigable waters within the state. Thus, although state and federal jurisdiction is concurrent over navigable waters within the state, state jurisdiction does not include regulations and control of tanker ballasting or deballasting operations. Federal jurisdiction over ballasting and deballasting of tankers is, by reason of Title II, PWSA, exclusive and state statutes and regulations relating to this subject are preempted. The provisions of the PTSA leave no doubt

that federal control of ballasting and deballasting of tankers is exclusive.

Although Coast Guard regulations dealing with tanker deballasting were promulgated under authority delegated in Title II, PWSA,[31] identical regulations could have been promulgated just as easily under authority delegated in 33 U.S.C. § 1321. The preemption provisions contained in 33 U.S.C. § 1321 preclude state or local law inconsistent with that section. Obviously the preclusion must apply not only to statutory provisions enacted by Congress but to regulations lawfully promulgated under the statute. This would be true even without the express prohibition barring conflicting state or local laws. Indeed, comprehensive Coast Guard regulations dealing with oil transfer facilities, vessel design and operations, and oil transfer operations were promulgated under authority of FWPCA, 33 U.S.C. § 1321. Even though Congress may not completely foreclose state legislation in a particular area, a state statute is void to the extent that it conflicts with a federal statute. And a conflict will be found "where compliance with both federal and state regulations is a physical impossibility. . ." *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

I conclude the Coast Guard regulations dealing with tanker ballasting or deballasting apply to all navigable waters over which the federal government has jurisdiction. To the extent that Alaska's laws and regulations extending to navigable waters within the state are in conflict with Coast Guard regulations, state law is invalid.

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[31] 46 U.S.C. § 391a.

Accordingly, plaintiff is entitled to summary judgment on this issue.

DATED at Anchorage, Alaska, this 17th day of September, 1979.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

APPENDIX C

[Counsel Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NO. A77-195-CIVIL

CHEVRON U.S.A. INCORPORATED, *et al.*,
Plaintiffs,

and

INTERCONTINENTAL BULKTANK CORPORATION, *et al.*,
Intervening Plaintiffs,

UNITED STATES OF AMERICA,
Amicus Curiae,

vs.

JAY S. H[illegible]MOND, Governor of the State of Alaska, *et al.*,
Defendants,

and

CORDOVA DISTRICT FISHERIES UNION, *et al.*,
Intervening Defendants.

Before Hon. James M. Fitzgerald, Judge Presiding

Final Judgment

Filed: November 19, 1981

INTRODUCTION

This judgment concludes a four-year litigation in which plaintiffs challenged provisions of Alaska law and regulations imposing design, equipment and operational requirements on oil tankers navigating in Alaska waters. The challenged statutory provisions were originally enacted in 1976 as Chapter 266, 1976 Alaska Laws, and were substantially altered by the passage of HB 205, codified at Chapter 116, 1980 Alaska Laws, effective July 1, 1980.

This complex litigation has proceeded in several phases, in which the Court has previously determined most of the issues presented. In order to put this Final Judgment in context, it is important to summarize these prior proceedings.

Pretrial Phase

The complaint in this action was filed on September 16, 1977. In March 1978, prior to the trial of the issues presented in Phase I, the U.S. Supreme Court rendered its decision in *Ray v. Atlantic Richfield Company,* 435 U.S. 151 (1978), which held state regulation of tanker design and equipment and, to a more limited extent, state navigational requirements preempted by the federal Ports and Waterways Safety Act ("PWSA"). In the wake of *Ray,* the parties entered into a stipulation agreeing that certain provisions of Alaska law and regulations were unconstitutional and void. Accordingly, on April 19, 1978, the Court, pursuant to this stipulation of the parties, entered a Partial Final Judgment and Permanent Injunction which declared (i) that the provisions of AS 30.20.020(a) and 18 AAC 27.010 (a) & (b), which required certain tank vessels to have two marine radar systems, collision avoidance radar systems, LORAN-C navigational equipment and other position location systems as might be prescribed by the Alaska Department of Environmental Conservation ("ADEC"), were preempted by Title II of the PWSA and invalid under the Supremacy Clause; (ii) that the provisions of 18 AAC 27.010(c) and (d), which required tug escorts for certain tank vessels calling at Valdez, Alaska, were preempted by Title I of the PWSA and invalid under the Supremacy Clause; and (iii) that the provisions of AS 46.03.750(e) and 18 AAC 27.010(f) and (g), insofar as they regulated the placement of ballast water in tank vessel cargo tanks,

were invalid under the Commerce Clause as an unreasonable burden on interstate and foreign commerce.

Phase I

In Phase I, the Court considered plaintiffs' challenge to provisions of Chapter 266 assessing annual risk charges on tank vessels operating in Alaska and establishing a Coastal Protection Fund. On June 5, 1978, the parties filed an extensive stipulation, contained in the proposed Fourth Pretrial Order, in which the parties defined the issues to be tried and stipulated to some 312 pages of agreed facts and 126 exhibits. The Fourth Pretrial Order was entered by the Court at the outset of trial. The matter was then tried to the Court, beginning on June 12, 1978, and concluding on June 26, 1978.

On June 30, 1978, the Court handed down its Memorandum of Decision invalidating (i) AS 30.24.040(e), 30.24.250 and 30.25.270 and all implementing regulations on the ground that the state's scheme of risk charge assessments was preempted by PWSA and (ii) AS 30.24.200-.270 and all implementing regulations on the ground that the state's Coastal Protection Fund constituted a dedication of license fees for a special purpose and thus void under Article IX, Section 7 of the Alaska Constitution. On September 18, 1978, the Court entered Additional Findings of Facts and Conclusions of Law to supplement and amend those contained in its Memorandum of Decision.

Pursuant to the June 30, 1978 Memorandum, the Court on July 21, 1978 entered a Partial Final Judgment invalidating and permanently enjoining the enforcement of the aforementioned provisions of Chapter 266. The judgment was certified as final pursuant to Fed.R.Civ.P. 54(b). Defendants filed a timely notice of appeal, but subsequently abandoned that appeal.

Phase II

Pursuant to the Court's Fifth Pretrial Order of November 6, 1978, on December 20, 1978, plaintiffs moved for summary judgment as to three additional claims raised by the complaint: (i) the permissibility of state regulation of deballasting; (ii) the constitutionality of warrantless ADEC boardings and inspections of tank vessels; and (iii) the propriety of the state's certification requirement for tank vessels operating in its waters. In Phase II, the Court considered the first of these claims, *i.e.*, whether PWSA preempted the state's authority to prohibit tank vessels from discharging ballast water from cargo tanks and to require that such ballast water be processed in an onshore ballast water treatment facility. On September 18, 1980 the Court handed down its Memorandum Decision in Phase II invalidating under the Supremacy Clause (i) AS 46.03.750(e), which prohibited the discharge of ballast water from cargo tanks and required that ballast water be processed in an onshore treatment facility and (ii) AS 46.03.750 (a)-(c), which prohibited a vessel from taking on petroleum as cargo unless it had arrived at a port in the state without having discharged ballast at sea at any time while enroute to Alaska whether or not the voyage commenced from a port in Alaska.

Phase III

Following a status conference held on November 6, 1979, the Court requested and the parties filed a joint stipulation of facts respecting the certification and inspection issues. Shortly after the stipulation was filed, the Alaska Legislature enacted HB 205, which among other things repealed the state's certification requirement and thus rendered moot that aspect of plaintiffs' summary judgment motion. With respect to the inspection issue, the Court requested additional briefing and

entertained oral argument on November 21, 1980. On September 10, 1981, the Court handed down a Memorandum and Order. Although the Court abstained as to plaintiff Chevron USA, Inc. (because of a pending state criminal prosecution for refusing to permit an inspection) as to all other plaintiffs it invalidated under the Fourth Amendment the provisions of AS 46.04.060 and 18 AAC 20.070(a) (1) which authorize warrantless inspections.

JUDGMENT

In light of the foregoing and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the provisions of AS 46.03.750(a)-(c) and .750(e), which prohibit the loading of a tank vessel which has discharged ballast water from cargo tanks while en route to Alaska and which require that all ballast water carried in cargo tanks be processed in an onshore facility and not discharged into state waters are preempted by Title II of the Ports and Waterways Safety Act, as amended, 46 U.S.C. § 391a, and are thus void and unenforceable under the Supremacy Clause of the United States Constitution.

2. That plaintiffs' challenge to the provisions of AS 30.25.040(b) & (c), which formerly required each owner and operator of a tank vessel to obtain annually a certificate of risk avoidance, is dismissed as moot.

3. That the provisions of AS 46.04.060 and 18 AAC 20.070(a)(1), which authorize ADEC to conduct warrantless boardings and inspections of tank vessels operating in Alaska are violative of the search and seizure clause of the Fourth Amendment to the United States Constitution and thus void and unenforceable. No owner or oper-

ator of any tank vessels shall hereafter be required to submit to such warrantless boardings and inspections nor be sanctioned for a refusal to do so.

4. In view of the pending criminal proceeding against a subsidiary of plaintiff Chevron USA, Inc. ("Chevron") for refusing to permit an ADEC inspection, that the Court abstains from ruling on the inspection issue as to Chevron and that Chevron's claim on this issue is dismissed.

5. That defendants and each of them and their successors and agents and any and all persons acting on their behalf, at their direction or under their control, or acting on behalf, at the direction or under the control of their successors and agents, are hereby permanently enjoined from taking any action to implement or enforce the above provisions of Alaska law and regulations in the respects set forth in Paragraphs 1 and 3, or from acting in a manner inconsistent with said paragraphs.

6. At the request of plaintiffs and intervening-plaintiffs, that all remaining claims raised by the complaint are hereby dismissed without prejudice.

7. That plaintiffs and intervening-plaintiffs are awarded their costs of suit in the amount of $.

DATED: November 19, 1981.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

cc: HARTIG, RHODES, NORMAN, MAHONEY & EDWARDS, Treptow, Anderson, Mertz, Mintz.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

CHEVRON U.S.A., INC., *et al.*,
Plaintiff-Appellees,

and

INTERCONTINENTAL BULTANK CORPORATION, *et al.*,
Intervening Plaintiffs-Appellees,

vs.

JAY S. HAMMOND, Governor of the State of Alaska, *et al.*,
Defendants-Appellants,

and

CORDOVA DISTRICT FISHERIES UNION, *et al.*,
Intervening Defendants-Appellants.

Order Denying Petition for Rehearing

Filed: August 9, 1984

Before: PREGERSON, ALARCON, and NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing.

Both of the arguments raised in the petition are either wrong or irrelevant. Petitioners' NPDES argument is misleading. Even where the state does not apply to administer its own NPDES permit program, the EPA must still enforce state water quality standards in issuing NPDES permits. In any event, even if petitioners' contention were correct and Alaska's deballasting prohibition were not an official "state water quality standard" enforceable under the CWA, our disposition would not be affected. We examined the CWA not to definitively construe that Act's NPDES regulations, but to demonstrate congressional *intent* under the PWSA/PTSA that there should be federal-state collaboration in the regulation of oil pollution within three miles of shore.

Petitioners' second assertion — that the EPA has construed the CWA as excluding deballasting — is based solely on the language of 40 C.F.R. § 122.3 (1983) rather than on any specific administrative interpretation relating to deballasting. At a minimum, their argument is farfetched. To compare the dumping of enormous quantities of oil-tinged ballast with the small amount of material involved in "incidental discharges" like galley wastes is unrealistic. The regulation does not even exempt rubbish or garbage that may be thrown overboard.

APPENDIX E

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, Clause 2 of the United States Constitution provides:

> "This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 46.03.750, Alaska Statutes, provides:

> "BALLAST WATER DISCHARGE. (a) Except as provided in (b) of this section, a person may not cause or permit the discharge of ballast water from a cargo tank of a tank vessel into the waters of the state. A tank vessel may not take on petroleum or a petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast from cargo tanks into the waters of the state and the master of the vessel certifies that fact on forms provided by the department.
>
> "(b) The master of a tank vessel may discharge ballast water from a cargo tank of his tank vessel if it is necessary for the safety of the tank vessel and no alternative action is feasible to assure the safety of the tank vessel."

No. 84-634

In The
Supreme Court of the United States
October Term, 1984

CHEVRON U.S.A., Inc., et al.,

Petitioners,

vs.

JAY S. HAMMOND, GOVERNOR OF THE STATE OF ALASKA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

May the State of Alaska, consistent with the Supremacy Clause, prohibit oil tankers from discharging oil-contaminated ballast water into state waters, when the U.S. Coast Guard's regulations do not grant a right to such a discharge and the Clean Water Act affirmatively allows states to impose stricter discharge requirements than those of the federal government?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

No. 84-634

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1976 the Alaska Legislature passed a statutory prohibition on the discharge of ballast water from cargo tanks of oil tankers into state waters. This legislation was prompted by evidence that ballast water discharged from cargo tanks, i.e., tanks which contain oil for a portion of a voyage, always contain residual oil, and that even min-

ute amounts of oil harm larval crustaceans important to Alaska's fishing economy.[1] (CR 141)[2]

In 1977 petitioner Chevron U.S.A. filed suit on the issue in the instant case and others. The U.S. District Court issued final rulings on a variety of issues in the case in 1979 and 1981; in 1981, the present respondents appealed the District Court's adverse ruling on the instant issue to the U.S. Court of Appeals for the Ninth Circuit. On February 3, 1984, the Court of Appeals reversed, ruling for the State of Alaska defendants. After receiving an extension of time until June 2, 1984, Chevron U.S.A. lodged a Petition for Writ of Certiorari with this Court on June 4, 1984; the Petition was rejected as untimely. On June 18, 1984, this Court denied Chevron's motion for leave to file an untimely petition for writ of certiorari. (Appendix B). Simultaneously, however, Chevron had returned to the Court of Appeals with a motion to allow a late petition for rehearing; it conceded in its moving papers that its motivation was to secure a new mandate from the Court of Appeals, thus, it believed, starting over its time for petitioning for certiorari in the Supreme Court.[3] The Court of Appeals allowed the untimely motion for rehearing to be filed, then denied the petition

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[1] The statute, Alaska Statute 46.03.750, was amended in 1980, following the District Court decision, to give the tanker industry more discretion in deciding appropriate methods of complying with the no-discharge requirement. See chapter 116, 1980 Session Laws of Alaska.

[2] Record citations are to the District Court's Clerk's Record prepared for the Court of Appeals.

[3] Supreme Court Rule 20.4 states that a "timely filed" petition for rehearing starts the time limit for petitioning for cer-

(Continued on next page)

on August 9, 1984. The renewed Petition for Writ of Certiorari was then filed and served on respondents on October 22, 1984.[4]

Chevron's basic claim below was that the Alaska statute was preempted by the Ports and Waterways Safety Act (PWSA), P.L. 92-340, 46 U.S.C. § 391a, because the state standard for discharge of contaminated ballast water is stricter than that in Coast Guard regulations promulgated under the PWSA.[5]

The Court of Appeals' decision noted that neither the PWSA nor the Coast Guard regulations contain an explicit

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(Continued from previous page)

tiorari anew. It is unclear whether the time period is also enlarged when, as here, the petition for rehearing was *not* timely but was nonetheless allowed to be filed by the Court of Appeals.

[4] The renewed Petition for Certiorari is not limited to a request for review of the new issues raised in the Motion for Rehearing to the Court of Appeals; it requests review of all the issues argued in the first Petition which this court refused to receive.

[5] The Coast Guard regulations, at 33 C.F.R. §§ 157.29, 157.37, allow tankers to discharge "oily" ballast beyond fifty miles from land, but prohibit discharging all except so-called "clean ballast" (ballast containing low levels of oil) within fifty miles. The Alaska statute effectively prohibits discharge of any ballast containing oil within the 3-mile state waters.

Chevron repeatedly uses the phrase "clean ballast" in its petition as if it refers to oil-free ballast; this is misleading. In fact, "clean ballast" is a term used in the Coast Guard regulation to indicate ballast which merely contains less contaminant than so-called "dirty ballast." All parties agree that ballast water from cargo tanks—whether "clean" or "dirty"—always contains oil. Chevron also states, as if it were fact, that the Coast Guard regulations expressly permit discharge of contaminated ballast in state waters; this is one of the main legal issues, and the court of appeals resolved it against Chevron.

reference to an intent to preempt (as Chevron conceded below). It also noted that it is possible for every tanker to comply with the requirement without physical alteration and without being subjected to conflicting standards in other jurisdictions.[6] Finally, it also noted that the Clean Water Act, passed in the same Congress as the PWSA, affirmatively grants states the right to impose stricter discharge requirements than the federal government in state waters.[7]

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REASONS FOR DENYING THE WRIT

Summary of Argument

A writ of certiorari should be denied in this case because it presents no issues important enough to warrant the Court's review. Petitioners concede that it will affect only one small and aging vessel, operating in the waters of one state. No other cases in other jurisdictions have complained of similar laws, and there are no conflicting lower court decisions. No disruption of the tanker industry has occurred and petitioners can show no likelihood of any. Most importantly, the tanker industry itself is moving voluntarily to the cleaner and more efficient operation of

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[6] Chevron had argued that Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), contains a finding that Congress intended the PWSA to preempt the field of tanker deballasting. But the Court of Appeals ruled that in *Ray* this Court affirmed the right of states to impose non-discriminatory environmental operational requirements on tankers so long as they were not design and construction requirements. 435 U.S. at 164.

[7] There are two "non-preemption" provisions in the Clean Water Act, at 33 U.S.C. § 1321(o)(2) and 33 U.S.C. § 1370.

vessels required by the statute at issue, so the controversy is disappearing and hardly merits review at this level.

I. The Impact Of This Case Is Minor And Neither National In Scope Nor Recurring.

Rule 19 of the Supreme Court Rules states that certiorari will be granted only when the question is "important" or "of substance", *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955) or is of a recurring nature, *Baggett v. Bullit,* 377 U.S. 360, 366 (1964). This case has little importance for anyone other than the litigants and even then will have little long-term impact for petitioners. It deals with a problem which is diminishing, not recurring.

A. Only one vessel is affected by his ruling.

Alaska law prohibits discharge of oil-contaminated tanker ballast water into state waters. Tanker owners have a variety of means available for compliance, including use of segregated ballast tanks, use of shore-based deballasting facilities, use of oil barges instead of tankers, and use of stationary barges for receiving tanker oily ballast for later transfer to an onshore deballasting facility. Since passage of the statute, every tanker used in Alaskan waters except one has come into compliance through one of the above methods. The single exception is Chevron's *Alaska Standard,* a small aging vessel which transports a portion of the oil used in various coastal communities. In fact, the *Alaska Standard* discharges polluted ballast in only some of the ports it visits; it is able to comply fully in other ports by using onshore reception facilities. (CR 141) Thus, the practical effect of the ruling below is minimal, i.e., requiring Chevron to modify its operation of one small vessel in a few ports so as to join

the rest of the industry, including its competitors, in no longer discharging oil into state waters.

B. There are no broader ramifications of the ruling below.

Chevron contends that the ruling below "threatens to disrupt the tanker industry"; they offer no indication of how it could do so, and the record contains no such evidence. Two points are clear: The tanker industry trend toward segregated ballast tanks and on-shore deballasting facilities is world-wide and will not be accelerated by requiring the *Alaska Standard* to comply with Alaska's laws. And secondly, the fear that the ruling below will disrupt the industry by causing a proliferation of varying state discharge standards is illusory: under the Clean Water Act every state has its own standards for discharge of scores of pollutants, from sewage to garbage to oil, from vessels into state waters. These varying standards have been upheld numerous times (e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973)) and the tanker industry has never been disrupted by having to comply with them.[8]

In any case in the eight years since Alaska passed its law, no other state has duplicated it, and not a single other lawsuit regarding preemptive effect of the PWSA has

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[8] Of course if varying state standards required design changes or were so conflicting that compliance were physically impossible, preemption would result, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). But Alaska's law requires no physical alteration of vessels and is compatible with federal law, so under *Ray*, no preemption problem exists. That there have been no conflicting requirements or disruptions of the industry is shown by the industry's overwhelming compliance with Alaska's law.

been filed in federal courts. This is clearly not a matter of national imoprtance, and given the lack of similar statutes or cases, it can hardly be said to be a recurring problem.

C. Alaska's law will not hinder Coast Guard anti-pollution efforts.

Chevron contends that this case should be reviewed because Alaska's statute somehow frustrates the Coast Guard's regulation of tanker pollution. In fact as the Court of Appeals found Alaska's statute does not conflict with or frustrate federal requirements. Chevron's theory depends on the assumption that the Coast Guard grants an affirmative right to pollute, where Alaska prohibits it; and that failure to allow tankers to pollute state waters somehow upsets and frustrates a grand Coast Guard scheme to reduce pollution. Neither is true.

The Coast Guard regulations set out two different sets of restrictions on discharge of contaminated ballast within fifty miles of land the regulations prohibit all discharges of oil-contaminated ballast except that with oil levels too low to create a visible sheen, sludge, or emulsion; beyond fifty miles tankers may discharge even more contaminated ballast. Chevron reads this as according tankers the positive right to discharge low-level contaminated ballast within the fifty-mile zone, which would conflict with the state's prohibition on discharges within the 3-mile zone of state waters. To make this argument, Chevron must posit that the PWSA, whose purpose they concede is to protect the marine environment, has its purpose frustrated by a state statute which provides an even greater measure of protection to the environment. In fact,

this is a simple case of a set of federal restrictions vis-a-vis a set of state regulations which go beyond the federal regulations in the same direction; the state regulations do not frustrate the purpose of the federal regulations, they advance it. It is not logical, in view of the PWSA's purpose, to theorize that it intended to accord a positive right to pollute, nor is there any support in the Act for that theory.

Likewise there is no support for the theory that Alaska's law will somehow frustrate a grand Coast Guard comprehensive plan to reduce pollution. The Coast Guard may have arrived at a different judgment than Alaska's on how stringent the restrictions on pollution ought to be, but there is no evidence that the Coast Guard affirmatively desires tankers to discharge oil in state waters. And there is no evidence that the Coast Guard's overall plan to reduce tanker pollution will be frustrated if tankers are banned from polluting state waters.[9]

D. Alaska's law will not hinder international efforts against pollution.

Chevron theorizes that Alaska's law, which operates only within the 3-mile zone, will somehow hinder efforts to reach international agreements on pollution control.

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[9] Chevron asserts in its Petition (p. 22) that Alaska's prohibition on contaminated ballast discharge "renders purposeless" equipment required by the Coast Guard. This is simply untrue. Alaska's law applies only in the 3-mile state waters; beyond three miles, to the 50-mile limit set by the Coast Guard, the federal requirements for onboard equipment remain just as necessary and purposeful as their authors intended. Moreover, some of the required equipment, i.e., the above-water piping, is utilized every time a vessel uses onshore deballasting facilities.

In fact, this legislation is irrelevant to international agreements and will have no effect on international relations. The international treaty-making efforts cited by Chevron relate solely to pollutant discharges on the high seas; as the court below found, none of the treaties to which the U.S. is a signatory or is considering joining affects operations in territorial waters (see, e.g., the 1978 MARPOL Protocol). Indeed, the U.S. has consistently insisted, in negotiating international agreements on pollution, on the right to apply different standards in territorial waters; the Ports and Waterways Safety Act, at 46 U.S.C. § 391a(6), explicitly authorizes regulations exceeding international standards.

In point of fact, Congress, in the PWSA and elsewhere, even when accepting international standards on the high seas, has always insisted on the right to apply its own domestic standards to pollution of coastal waters. By using the Clean Water Act as the primary device for setting pollutant discharge standards in coastal waters, Congress has made clear that allowing states to set their own reasonable standards is not an impermissible interference with international treaty-making. Chevron has offered no credible evidence that any such interference actually occurs, and there is no support for the proposition in the record.

II. The Controversy Will Soon Become Moot.

A. The industry is moving toward elimination of the type of vessel at issue here.

Both federal legislation and international agreements have resulted in a clear tanker industry trend in the last decade. Most new tankers are built with segregated bal-

last tanks, eliminating the need for putting ballast in cargo tanks and thus contaminating it; more on-shore deballasting and oil/water separating facilities are being built; small tankers are being replaced by barges on coastal hauls, such as that of the *Alaska Standard*.[10] With increasing environmental regulation and improving technology, new cleaner vessels are fast replacing those which discharge oil-contaminated ballast. The Alaska market is a case in point: Since initial passage of the statute at issue here, in 1976, the entire fleet serving Alaska has switched to onshore deballasting or been converted to segregated tanks. When the aging *Alaska Standard* retires (it was built in 1959), the entire fleet will have come into compliance with Alaska's pollution standards by the ordinary process of modernization over time. Thus there is no cause for Supreme Court intervention, since the mere passage of time will moot the controversy.

B. Congress is considering legislation which would moot the ruling here.

Recently Congress has been considering legislation which would revamp the national approach to oil spills, including preemption of some or all state oil spill legislation. During the current session the House Merchant Marine Committee passed out a version of the Comprehensive Oil Pollution Liability and Compensation Act which would preempt state oil spill liability laws, most

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10 Fuel barges supply much of the oil product delivered in the area served by the *Alaska Standard* and other vessels. Contrary to Chevron's assertion, the District Court record shows evidence exists that barges are in fact environmentally safer than tankers, since barges spill less oil per accident than tankers. Chevron itself uses barges as well as tankers.

likely including the one at issue here.[11] Although Congress will likely take no further action this year, the proposal for a national preemptive oil spill law will doubtless be considered again early in the new Congress. The Administration supported the preemption provisions of the proposed Act this year, so the possibility of mootness through new legislation must be considered very real.

III. There Are No Conflicting Decisions, And Resolution Can Wait Until Conflict Arises.

Chevron states that this Court should review the ruling below because it threatens to disrupt the tanker industry. As we note above, such "disruption" is almost totally illusory, since only one aging vessel would be effected. Chevron also asserts the "possibility" of similar laws in other states, with attendant dire consequences. In the years since Alaska's law was passed in 1976, no such laws have passed and no such disruption has occurred.[12] In fact, the consequences of such restrictions on the industry are so minor that there are no other cases on this or related controversies, and no other court of appeals decisions, much less conflicting ones. It is apparent

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11 That bill, HR 3278, was eventually merged into HR 5640, the so-called oil spill "Superfund" bill; HR 5640 has a narrower preemption provision which would not affect the Alaska statute at issue here. It is likely that both provisions will be reintroduced in the next Congress.

12 In fact every state already has its own standards for discharge of pollutants into state waters, promulgated under the Clean Water Act; no disruption of the industry has resulted. We also note that in 1980, following the District Court decision, the Alaska statute at issue here was liberalized to give the industry free scope to decide on alternatives to discharge of contaminated ballast; the earlier version required that it be transferred to an on-shore deballasting facility.

that this is not a controversy which is growing or which needs immediate resolution at the highest federal level: if in fact other states ever follow suit, and if in fact the tanker industry became discommoded by such laws, legal challenges would arise. There is nothing in the record to indicate that the national interest cannot wait for other cases to arise, to be either resolved at the court of appeals level, or by this Court if a conflict arises. But for now, there are no other cases and, therefore, no conflict among circuits, and there is nothing to indicate a need for the Supreme Court to resolve the questions. At the same time *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), has not engendered new questions on the application of the PWSA; the court of appeals clearly followed *Ray* fully, considering each element of that decision as it applied here. Given the lack of other cases on the same statute, *Ray* hardly needs to be reexamined after this short period.

IV. Review Of The Ruling Below Would Require A Detailed Factual Inquiry.

The ruling below required a detailed study of the legislative history and language of both the PWSA and the Clean Water Act, as well as a particularized inquiry into a number of detailed factual questions which are unique to this case. Chevron's position rests in part on the theory that Alaska's statute will require widespread changes in the tanker industry, including physical alterations of vessels; it also theorizes that Alaska's prohibition upsets carefully balanced regulations taking into account vessel design, available facilities, and the economics of the oil transportation business. To review the merits of these assertions, the lower courts had to consider factual questions such as the following: Are tank vessels used in the Alaska

trade already constructed in such a way that compliance with the Alaska law is physically possible without redesigning and retrofitting? What shore-based facilities are available in what locations, and are they adequate as an alternative to retrofitting vessels? Will the economics of the world-wide tanker industry react to laws like Alaska's by causing mass avoidance of local markets? By a change in present tanker design and construction? By a shift to barges or other transportation modes? Will enforcement of Alaska's law result in non-availability of onshore deballasting facilities for heavily contaminated ballast, as asserted by Chevron? Will the industry react by internal changes which frustrate the Coast Guard's overall anti-pollution strategy?

The Court of Appeals has already digested the voluminous and complex facts on these points. This Court can adopt the Court of Appeals' factual conclusion, which was that Alaska's statute will not require widespread changes in the tankard Industry. However, in order to find Chevron's assertions proper cause for reversal, this Court would need to make its own examination an analysis of these complex issues. Following that review, reversal would be appropriate only if this Court reached a conclusion contrary to that reached by the lower court. Moreover, those facts are unique to the situation of the Alaska tanker trade, making a decision in this case of little relevance to other similar cases, if others should ever arise.

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CONCLUSION

This case does not merit review by the Supreme Court: It has no far-reaching impacts, will likely become moot over time, and presents no great questions of law for resolution. We respectively request this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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ATTORNEY GENERAL

DOUGLAS K. MERTZ
Assistant Attorney General

Counsel for State of Alaska Respondents

November, 1984.

APPENDIX A

Alaska Statutes

AS 46.03.750

Effective until July 1, 1980

Sec. 46.03.750. Ballast water discharge. (a) No person may pollute or add to the pollution of waters of the state by discharging from any vessel ballast water, tank-cleaning waste water or other waste containing petroleum in excess of the maximum permitted by the water quality standards established under §§ 70 and 80 of this chapter and in no event may a vessel discharge ballast water, tank-cleaning waste water or other waste containing petroleum in excess of 50 parts per million of oil residue.

(b) Except as provided in (c) of this section, no vessel may take on petroleum or any petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast at sea during the period of time from departure of the vessel enroute to the state from a port outside the state to arrival at a port in the state or while in transit between ports in the state, and the master of the vessel certifies the fact on forms provided by the department.

(c) Vessels equipped with tanks used exclusively for ballast or capable of producing ballast with an oil content less than that provided for in (a) of this section may discharge that ballast at sea, including the waters of the state, if it meets the standards of (a) of this section and the master of the vessel certifies that fact on forms provided by the department.

(d) Repealed by § 19 ch 220 SLA 1976.

(e) Cargo in tank vessels, as defined in AS 30.20.060(9), engaged in the marine transportation of

crude oil, refined petroleum products or their by-products may not be placed in segregated ballast tanks, nor may ballast be placed in cargo tanks of those tank vessels having segregated ballast systems. However, the department may by regulation permit the placing of ballast in the cargo tanks of those vessels in emergency situations. All ballast placed in cargo tanks shall be processed by or in an onshore ballast water treatment facility and may not be discharged into the waters of the state. (§ 3 ch 120 SLA 1971; am § 19 ch 220 SLA 1976; am § 3 ch 266 SLA 1976)

AS 46.03.750(a)(b)
Effective after July 1, 1980

Sec. 46.03.750. Ballast water discharge. (a) Except as provided in (b) of this section, a person may not cause or permit the discharge of ballast water from a cargo tank of a tank vessel into the waters of the state. A tank vessel may not take on petroleum or a petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast from cargo tanks into the waters of the state and the master of the vessel certifies that fact on forms provided by the department.

(b) The master of a tank vessel may discharge ballast water from a cargo tank of his tank vessel if it is necessary for the safety of the tank vessel and no alternative action is feasible to assure the safety of the tank vessel. (§ 3 ch 120 SLA 1971; am § 19 ch 220 SLA 1976; am § 3 ch 266 SLA 1976; am § 3 ch 116 SLA 1980)

United States Code
33 U.S.C. § 1321(o)

(o) *Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified*

or affected. (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this Act or any other provision of law, or to affect any State or local law not in conflict with this section.

33 U.S.C. Section 1370

§ 1370. State authority.

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or

political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

(June 30, 1948, ch. 758, Title V, § 510, as added, Oct. 18, 1972, P. L. 92-500, § 2, 86 Stat. 893.)

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

June 18, 1984

Richard E. Sherwood, Esq.
Charles P. Diamond, Esq.
400 South Hope Street
Los Angeles, California 90071

RE: Chevron U.S.A., Inc., et al. v. Jay S. Hammond
No. —

Gentlemen:

The Court today entered the following order in the above-entitled case:

"The motion to direct the Clerk to file a petition for writ of certiorari, out-of-time, is denied."

Your check in the amount of $200.00 is returned. Copies of your petition for certiorari are being returned under separate cover.

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By
Francis J. Lorson
Chief Deputy Clerk

Enc.

cc: Counsel of record
Honorable Rex E. Lee,
Solicitor General

(3)

No. 84-634

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHEVRON U.S.A., INC., ET AL., PETITIONERS

v.

WILLIAM J. SHEFFIELD,
GOVERNOR OF THE STATE OF ALASKA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12 pp

TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. For the reasons set forth below, the United States believes that the court of appeals incorrectly held that the ballasting and deballasting provisions of the Alaska Tanker Law were not preempted by federal regulations, but that the limited impact of the court's decision renders review by this Court unnecessary. In addition, we believe that review would be inappropriate in this case because the courts below failed to address several legal questions that are of considerable relevance to the question presented and as to which this Court should have the benefit of analysis by lower courts.

1. The United States participated as amicus curiae in the district court and the court of appeals to urge that the deballasting prohibition contained in Alaska Stat. § 46.03.750(e) (Supp. 1977)[1] is preempted by regulations promulgated pursuant to Title II of the Ports and Waterways Safety Act of 1972 (PWSA), 46 U.S.C. 391a, as amended by the Port and Tanker Safety Act of 1978 (PTSA), Pub. L. No. 95-474, 92 Stat. 1471 *et seq.*[2] It has been the position of the United States throughout this litigation that the PWSA and the PTSA systematically regulate pollution resulting from oil tanker operations and that the interest in a nationally uniform approach to the problem of oil pollution from vessels leaves no room for varying state regulations.

Congress first mandated the comprehensive regulation of tanker design, equipment, and operation to combat the problem of oil pollution when it passed the PWSA in 1972. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978), this Court considered Congress's purposes in enacting the PWSA and concluded that "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." The present controversy

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[1]This was the Alaska statute in effect at the time petitioners filed this action. The statute was amended in 1980 (Alaska Stat. § 46.03.750 (1980)), but the amendments do not alter the absolute prohibition against deballasting in state waters that remains at the heart of the present controversy.

[2]At the time petitioners filed this action, the PWSA was the only relevant federal statute dealing with the subject of deballasting. In 1978, Congress passed the PTSA. Although the PTSA provided that it was an amendment to the PWSA (92 Stat. 1471), it effectively replaced that Act. In 1983, as part of a partial revision and consolidation of Title 46 of the United States Code, both statutes were merged, and those provisions that are pertinent to this litigation are to be codified principally at 46 U.S.C. 3701-3718 (Pub. L. No. 98-89, 97 Stat. 520 *et seq.*).

involves operating regulations promulgated under the PWSA rather than design standards. Nevertheless, *Ray* provides the appropriate framework for analysis because design and operating requirements can be and in this case are intimately and inextricably linked in the integrated approach to the oil pollution problem deemed necessary by Congress. The legislative history of the PWSA clearly shows that Congress contemplated a "systems" approach because regulations affecting one area, such as design specifications, often have a ripple effect on other areas, such as construction requirements or operating standards. See S. Rep. 92-724, 92d Cong., 2d Sess. 12-14 (1972).

In accordance with its intent to promote a coordinated approach to the problems of oil pollution caused by vessels, Title I of the PWSA encompassed vessel traffic control, operating conditions, and navigational equipment, while Title II required the Coast Guard to establish regulations for the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, or manning" of oil tankers. 46 U.S.C. 391a(6)(A). In 1978, Congress incorporated the PWSA into the newly enacted PTSA (see note 2, *supra*), again stressing the interrelationship among design, construction, and operating standards (see Section 5 of the PTSA, 92 Stat. 1483), and again specifically directing the promulgation of regulations to promote "the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity" (*ibid.*). These provisions continue in force today (see note 2, *supra*).

Pursuant to the mandate of Title II of the PWSA to establish necessary regulations with respect to the design, construction, and operation of oil tankers (46 U.S.C. 391a(6)(A)), the Coast Guard promulgated regulations including design requirements and operating regulations controlling the discharge of ballast water. 33 C.F.R. Pt.

157. Under these regulations, "oily" ballast water may be discharged only if a vessel is proceeding en route more than 50 miles from the nearest land and if other specified conditions are met. 33 C.F.R. 157.37(a). Within 50 miles of the shoreline, tankers generally are prohibited from discharging "oily" ballast (33 C.F.R. 157.29), but they may discharge "clean" ballast (33 C.F.R. 157.03(e) and 157.43(a)).[3] In promulgating these and other operational standards, the Coast Guard has consistently employed the "systems" approach intended by Congress, in recognition of the interrelationship of design, construction, and operating requirements. See generally 33 C.F.R. Pt. 157.

2. The conflict between the applicable federal regulations and the Alaska statute is evident. As part of its comprehensive regulatory scheme, the Coast Guard permits the discharge of clean ballast in any waters and the discharge of dirty ballast more than 50 miles offshore under strict conditions. Alaska, attempting to deal with the problem of oil

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[3]The Coast Guard's regulations and the authorizing legislation impose standards largely derived from international agreements. In promulgating its regulations, the Coast Guard was guided by standards contained in the International Convention for the Prevention of Pollution from Ships, 1973 (Annex 1, Regulation 9), 12 I.L.M. 1319, 1343 (1973) [hereinafter cited as MARPOL 1973]. MARPOL 1973 was never ratified by the United States nor by a sufficient number of other nations to permit it to enter into force internationally. However, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, 17 I.L.M. 546 (1978) [hereinafter cited as MARPOL Protocol], modified or incorporated the standards contained in MARPOL 1973. See Art. I of the MARPOL Protocol, 17 I.L.M. 547. Subsequently, in 1980, Congress passed legislation to implement the MARPOL Protocol domestically (Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*), and the MARPOL Protocol entered into force internationally on October 2, 1983. The Act to Prevent Pollution from Ships, like the PWSA, the PTSA, and the Coast Guard's implementing regulations, reflects congressional recognition that oil pollution from tankers must be dealt with in a uniform manner on the international level. See generally H.R. Rep. 96-1224, 96th Cong., 2d Sess. 4 (1980); see also *Ray*, 435 U.S. at 166-168.

pollution from tankers in a different manner, totally prohibits the discharge into state waters of ballast water from a cargo tank of a tank vessel.

Nevertheless, the court of appeals reversed the district court's conclusion that the Alaska statute was preempted by the federal regulations (Pet. App. 1a-37a). In so doing, the court of appeals failed to recognize the importance of regulatory uniformity emphasized by this Court in *Ray*. This failure stemmed largely from the court's attempt to isolate each element of the comprehensive regulatory scheme deemed necessary by Congress. The court thus dismissed the significance of *Ray* by noting that it dealt only with the *design* and *construction* characteristics of tankers (Pet. App. 6a, 8a). But Congress has determined, in the PWSA and the PTSA, that oil pollution from tankers must be dealt with by regulating all aspects of the problem — design, construction, *and* operation — in an integrated fashion. As this Court observed in *Ray*, 435 U.S. at 154 (emphasis added), "[t]he PWSA * * * subjects to federal rule the design and *operating* characteristics of oil tankers." In our view, therefore, the court of appeals erred by failing to recognize that the need for uniformity is as great in the area of operating standards as it is in the area of design and construction standards. The court further erred in its attempt to pigeon-hole vessel operations, vessel design, and vessel construction. The integrated approach mandated by Congress does not permit such compartmentalization of a single problem.

Moreover, the court of appeals' review of the preemptive nature of the regulations issued to implement the PWSA and the PTSA was fundamentally flawed by its mistaken assumption (Pet. App. 10a, 13a-14a) that the discharges at issue are subject to the National Pollutant Discharge Elimination System (NPDES) of the Clean Water Act (CWA), 33 U.S.C. 1342. In fact, the regulations promulgated by the

Environmental Protection Agency to implement the NPDES program specifically exempt from the NPDES permit program discharges from vessels incident to their normal operations. 40 C.F.R. 122.3(a). Thus, much of the court's analysis, including its conclusion that "the Alaska statute at issue in this case is converted by the CWA into a federal standard which the EPA is required to enforce" (Pet. App. 13a-14a), rests on a legally erroneous premise.

3.a. Preemption issues inevitably raise sensitive questions concerning the respective roles of the national and state governments in our federal system. Because the decision of the court of appeals is of limited impact and is not in direct conflict with any decision of this Court or any other court of appeals, it is unnecessary for the Court to undertake resolution of these questions in the present case. Only one vessel — Chevron's *Alaska Standard* — is affected by the court of appeals' decision (see Br. in Opp. 5-6), and, as noted by respondents (*id.* at 5), onshore reception facilities permit that vessel to comply with the Alaska statute at some ports, though not all. To date, no other state has enacted a law similar to Alaska's deballasting prohibition. In these circumstances, further review is not warranted.

b. In addition to the limited impact of the decision below, we believe that other factors counsel against review by this Court. Although the court of appeals clearly erred in concluding that the NPDES program has any relationship to this case, it is possible that another section of the CWA, basically dismissed by the court of appeals as irrelevant (see Pet. App. 14a n.9), does have a bearing on the proper resolution of the case. Section 311 of the CWA, 33 U.S.C. 1321, deals specifically with discharges of oil and other hazardous substances, and it does not contain an exemption for discharges from vessels. Section 311(b)(1), 33 U.S.C. 1321(b)(1), establishes a general "no discharge" policy for oil and other hazardous substances. Section 311(b)(3)

further prohibits discharges of oil into the navigable waters of the United States except in such quantities or locations as the President (who has delegated his authority to the Administrator of the Environmental Protection Agency) has determined not to be harmful. In determining harmful quantities, the President is required to take into account applicable water quality standards, which are established by the states (*ibid.*). EPA's regulations implementing Section 311 provide that any discharge of oil that violates applicable water quality standards is deemed "harmful" and is therefore prohibited (40 C.F.R. 110.3).

Accordingly, the first question that arises under Section 311, which was not addressed by the courts below, is whether the challenged Alaska statute prohibiting deballasting in state waters is an "applicable water quality standard" within the meaning of Section 311(b)(3). Until its amendment in 1980, Alaska Stat. § 46.03.750(a) (Supp. 1977) tied the deballasting prohibition to the State's water quality standards (see Br. in Opp. App. 1). When the statute was amended, however, the reference to state water quality standards was deleted (see *id.* at App. 2). The record does not contain any explanation for this particular change, and it is thus unclear whether the Alaska statute remains a state water quality standard enforceable through Section 311 of the CWA. (The district court did discuss Section 311 at length (see Pet. App. 46a-52a), but it did not consider whether the challenged Alaska statute might constitute a state water quality standard or the consequences of such a determination.)

Assuming, arguendo, that the Alaska statute could be construed as a state water quality standard, another question not addressed by the courts below is whether the provisions of the PWSA and the PTSA and their implementing regulations, which permit the discharge of "clean" ballast, would take precedence over Section 311 of the CWA in light

of Section 311(b)(3)'s requirement that the determination of "harmful" discharges of oil must be consistent with "maritime safety and with marine and navigation laws and regulations." This would be an entirely different "preemption" inquiry than the one undertaken by the court of appeals; instead of examining the consistency of the state statute with federal regulations, the question would involve the proper reconciliation of several different federal statutes.

Because these unsettled questions, which might well be determinative of the correct resolution of this case, do not appear to have received adequate treatment in the lower courts, the United States believes that it would be inappropriate for this Court to attempt to resolve them in the first instance. The limited impact of the decision in this case, discussed above, makes it particularly inappropriate to undertake resolution of new and complicated legal issues in this Court.[4]

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[4]Finally, we note that the Court may lack jurisdiction to entertain the petition. The time within which to file a petition for a writ of certiorari in this case expired on June 2, 1984, but the petition was not lodged with the Court until June 4, 1984. On June 18, 1984, this Court denied leave to file the petition out of time. Br. in Opp. 2. Although the court of appeals granted petitioners' motion to file an out-of-time petition for rehearing, that action was not taken until June 13, 1984, after the time for filing the petition for a writ of certiorari already had expired. Pet. 1. There is authority for the proposition that a petition for rehearing must be filed before the expiration of the time for filing a petition for a writ of certiorari. See *Conboy* v. *First National Bank*, 203 U.S. 141, 145 (1906); R. Stern & E. Gressman, *Supreme Court Practice* 400 (5th ed. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1985

DOJ-1985-04

No. 84-634

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CHEVRON U.S.A., INC., et al.,
Petitioners

VS.

WILLIAM J. SHEFFIELD,
GOVERNOR OF THE STATE OF ALASKA, et al.,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONERS IN REPLY TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PETITIONERS IN REPLY TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in reply to the Solicitor General's memorandum expressing the views of the United States. Petitioners agree with the Solicitor General's opinion that the court of appeals incorrectly held that the deballasting prohibition of the Alaska Tanker Law is not preempted by federal regulations. However, for the reasons set forth below, Petitioners believe the Solicitor General is wrong in concluding that this case does not warrant review by this Court.

1. In the Solicitor General's memorandum, the United States remains faithful to the position it has maintained throughout this litigation that the deballasting prohibition contained in Alaska Stat. § 46.03.750(e)(Supp. 1977) is preempted by regulations promulgated by the Coast Guard pursuant to Title II of the Ports and Waterways Safety Act of 1972 (PWSA), 46 U.S.C. 391a, as amended by the Port and Tanker Safety Act of 1978 (PTSA), Pub. L. No. 95-474, 92 Stat. 1471 *et seq.* Accordingly, Petitioners agree with the Solicitor General's conclusion that the court of appeals incorrectly reversed the district court's decision that the Alaska statute was preempted by federal regulations (S.G. Memo. 1-5). More importantly, Petitioners concur in the Solicitor General's determination that the court of appeals' decision is at complete odds with the thrust of this Court's decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (S.G. Memo. 5).

This Court was called upon in *Ray* to consider Congress' purposes in enacting the PWSA, which mandates the comprehensive regulation of tanker design, construction and operation to control the problem of oil pollution from tankers within 50 miles of shore. Although the Court's decision specifically addressed standards for design and construction of tankers, the analysis adopted by the Court is equally applicable to the operating regulations promulgated by the Coast Guard pursuant to the PWSA. Recognizing the interrelationship among design, construction and operating standards in the context of oil pollution control efforts, Congress contemplated an integrated, uniform approach to regulation in this area. As the Solicitor General correctly points out, this Court in *Ray* acknowledged Congress' intention that implementing regulations adopt such a "systems" approach in setting standards to control oil pollution from tankers (S.G. Memo. 5). The court of appeals erred in undercutting *Ray* by excepting tanker

operations as an element of the comprehensive regulatory scheme deemed necessary by Congress (S.G. Memo. 5).

2. Although noting the court of appeals' failure to heed the unmistakable principles laid down in *Ray*, the United States questions the wisdom of further review of this case by suggesting that enforcement of the Alaska deballasting prohibition will not have the disruptive effect that petitioners fear (*see* S.G. Memo. 6; *but see* Pet. 7-8). In this regard, petitioners respectfully suggest that even in the event the Court deems plenary review impracticable, this case is a model candidate for summary reversal. Aside from its misreading of *Ray*, the only justification advanced by the court of appeals for upholding the Alaska law was the proposition that Alaska's prohibition, as a National Pollutant Discharge Elimination System (NPDES) limitation, has the force of federal law under the Clean Water Act, 33 U.S.C. § 1342. However, as the Solicitor General demonstrates (S.G. Memo. 5-6), the regulation of deballasting is excluded from the scope of the Clean Water Act by 40 C.F.R. 122.3(a), which specifically exempts from the scope of the permit system such discharges as deballasting incident to normal vessel operations.

3. As the Solicitor General would be constrained to agree, the only remaining question is whether the Alaska Tanker Law is somehow saved from preemption by section 311(b)(3) of the Clean Water Act on the theory that it incorporates into the federal standard for lawful discharges of oil any discharge in violation of an applicable state water quality standard. We disagree with the Solicitor General's view that this issue received insufficient attention from the courts below. It was the principal argument of the state defendants before the district court, and the claim was categorically rejected by a court convinced that "neither the Act nor the caselaw provide[s] founda-

tion for the state of Alaska's position that Alaska's challenged legislation is protected under the FWPCA (the forerunner of the CWA)"[1] (Pet. App. 51a). Nonetheless, to the extent this Court believes that this question deserves more extensive lower court review, the appropriate disposition is a summary remand to the court of appeals, not a denial of the instant petition.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

April 30, 1985

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CHARLES P. DIAMOND
Counsel for Petitioners

Of Counsel:
O'MELVENY & MYERS
STEVEN L. SMITH

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[1]The district court, as does the Solicitor General, noted that Section 311(b)(3) also provides that the determination of "harmful" discharges of oil must be consistent with "maritime safety and with marine and navigation laws and regulations" (S.G. Memo. 8; Pet. App. 47a).

[2]The Solicitor General suggested that this Court may lack jurisdiction to entertain this petition because petitioners filed the petition for rehearing by the court of appeals after the time for filing the petition for a writ of certiorari had expired. The petition for writ of certiorari nevertheless was timely. The court of appeals, by considering the petition for rehearing on its merits, placed the basis of its decision again in issue and thereby enlarged the time for review. *Pfister v. North Illinois Finance Corp.*, 317 U.S. 144, 149-150 (1942); *Bernard v. Johnson*, 314 U.S. 19, 31 (1941). Nothing in *Conboy v. First National Bank*, 203 U.S. 141, 145 (1906), the much earlier case cited by the Solicitor General, forecloses this result.

SUPREME COURT OF THE UNITED STATES

CHEVRON U. S. A., INC., ET AL. *v.* WILLIAM J. SHEFFIELD, GOVERNOR OF ALASKA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–634. Decided June 3, 1985

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS respecting the denial of the petition for writ of certiorari.

Reasonable Justices can certainly differ on whether certiorari should be granted in this case. JUSTICE WHITE, in dissent, has explained why he favors a grant of the petition for writ of certiorari. There is, of course, no reason why that dissent should identify the reasons supporting a denial of the petition. Matters such as the fact that apparently only one 26-year-old vessel may be affected by the Ninth Circuit's ruling,[1] that apparently no other state has enacted a deballasting prohibition similar to Alaska's, and that the Coast Guard retains the power to modify its regulations relating to deballasting lend support to the Court's discretionary determination that review in this Court is not necessary even if the Court of Appeals' decision is arguably incorrect. I add these few words only because of my concern that unanswered dissents from denial of certiorari sometimes lead the uninformed reader to conclude that the Court is not managing its discretionary docket in a responsible manner. See *Singleton* v. *Commissioner*, 439 U. S. 940, 942, 945 (1978) (opinion of STEVENS, J., respecting the denial of the petition for writ of certiorari).[2]

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[1] Moreover, this vessel is able to comply with the Alaska statute at some ports because of the presence of onshore reception facilities, thus further highlighting the minimal effect of the Court of Appeals' ruling.

[2] As I noted in *Singleton*:

"Since the Court provides no explanation of the reasons for denying certiorari, the dissenter's arguments in favor of a grant are not answered and therefore typically appear to be more persuasive than most other opinions. Moreover, since they often omit any reference to valid reasons for denying certiorari, they tend to imply that the Court has been unfaithful to its responsibilities or has implicitly reached a decision on the merits when, in fact, there is no basis for such an inference." 439 U. S., at 945.

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JUSTICE WHITE, dissenting.

In this case, the United States Court of Appeals for the Ninth Circuit held that the State of Alaska's Tanker Act, Alaska Stat. §46.03.750(e) (1976), which restricts deballasting by oil tankers in Alaskan waters, was not preempted by regulations promulgated by the Coast Guard under Title II of the Ports and Waterways Safety Act of 1972 (PWSA).[1] I believe that in so holding, the court arguably "decided a federal question in a way in conflict with applicable decisions of this Court." This Court's Rule 17.1(b). Accordingly, I would grant certiorari to review the judgment of the Court of Appeals.

In *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978), we held that federal regulations governing oil tanker design and construction promulgated under Title II of the PWSA preempt more stringent state regulations covering the same subject matter. Our holding was based in large part on our conclusion that Title II was intended to authorize comprehensive standards "[t]o implement the twin goals of providing for vessel safety and protecting the marine environment." *Id.*, at 161. Under the statute, we observed, "the Secretary [of Transportation] must issue all design and construction regulations that he deems necessary for these ends, after considering the specified statutory standards." *Id.*, at 163. When

[1] 86 Stat. 424 (1972). Title II of the PWSA, as amended by the Port and Tanker Safety Act of 1978, Pub. L. No. 95–474, 92 Stat 1471, was, until 1983, codified at 46 U. S. C. §391a. In 1983, the PWSA/PTSA was recodified at 46 U. S. C. §§3701–3718.

a State has imposed a more stringent standard than the Secretary but the State and federal standards "ai[m] at precisely the same ends," we concluded, "the Supremacy Clause dictates that the federal judgment . . . prevail over the contrary state judgment." *Ibid.*

As the court below pointed out, *Ray* dealt with federal standards for tanker design and construction, whereas this case involves standards governing tanker operations—specifically, standards governing the discharge of seawater loaded into cargo compartments and used as ballast.[2] The need for national uniformity in the area of standards for tanker operations, the court concluded, is not so great as the need for uniformity in standards governing tanker operation and design; for while a tanker can under some circumstances alter its operating practices to conform to the requirements of the State whose territorial waters it is traversing, it cannot alter its construction or design. Accordingly, the absence of uniform design and construction requirements may be a far more serious impediment to the tanker industry than a lack of uniformity with respect to operations.

Although this distinction is not insubstantial,[3] the similarities between this case and *Ray* strike me as greater than the lower court was willing to recognize. Like *Ray*, this case in-

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[2] The federal standard prohibits discharge of such water within 50 miles of shore unless the water meets certain standards of cleanliness. 33 CFR §§ 157.03(a)(1), 157.29, 157.37(a)(1) (1982). The State standards forbid *any* discharge of water from a tanker's cargo tanks within Alaskan territorial waters, regardless of the cleanliness of the water.

[3] The distinction should probably not be overstated, however. Design specifications and operating procedures are in many respects inextricably linked, and this linkage is striking where ballasting—the subject of the regulations at issue in this case—is concerned. The design of a tanker may require it to use seawater as ballast in order to operate safely. Such a tanker may be unable to take on oil at a particular port if it may not deballast in waters adjacent to that port. Restrictions on deballasting thus may exclude certain tankers from certain ports fully as effectively as regulations prohibiting all tankers with particular design features.

volves federal regulations promulgated under Title II of the PWSA. As in *Ray*, the Secretary was obliged by the Act to issue "all . . . regulations that he deems necessary" to meet the goal of protecting the marine environment. 435 U. S., at 165; see 46 U. S. C. § 391a(1)(D); 46 U. S. C. § 391a(6)(A). And, as in *Ray*, the State statute at issue in this case aims at precisely the same goal as the federal regulation, and thus amounts to a rejection by the State of the federal judgment as to the level of protection necessary to achieve the common goal. Under these circumstances, I would have thought that there would be a strong presumption that our ruling in *Ray* was applicable here as well.

In rejecting the applicability of *Ray*, the Court of Appeals relied not only on its perception of a diminished need for uniformity in the area of standards governing tanker operations, but also on its belief that the Clean Water Act, 33 U. S. C. §§ 1251–1376, reflects Congressional recognition of concurrent State and federal authority to protect the environment within the territorial waters of the States. The court placed primary emphasis on those provisions of the Act that establish the National Pollutant Discharge Elimination System (NPDES), 33 U. S. C. § 1342, under which minimum federal standards regulating the discharge of pollutants may be supplanted by more stringent State standards. These provisions of the Clean Water Act, however, are of extremely limited relevance to the questions posed by this case, as federal regulations specifically exempt from the NPDES program discharges from vessels incident to their normal operation. 40 CFR 122.3(a). The Clean Water Act thus sheds little or no light on the question whether protection of the marine environment against the threats posed specifically by oil tanker traffic is, under Title II of the PWSA, a matter in which federal regulation has displaced state control.

The apparent inconsistency of the decision below with our own decision in *Ray*, coupled with the lower court's reliance on statutory materials of questionable relevance to the case

before it, leads me to conclude that this is a case in which we should exercise our discretionary jurisdiction. I therefore dissent from the denial of certiorari.